

D98TPANA

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 IN RE PETITION OF PANDORA MEDIA, INC. 12 CV 8035 (DLC)

4 -----x  
5 Related to

6 UNITED STATES OF AMERICA,

7 Plaintiff,

8 v.

41 CV 1395 (DLC)

9 AMERICAN SOCIETY OF COMPOSERS,  
10 AUTHORS AND PUBLISHERS,

11 Defendant.

12 -----x

New York, N.Y.  
September 11, 2013  
2:30 p.m.

13  
14 Before:

15 HON. DENISE L. COTE,

16 District Judge

17 APPEARANCES

18 KING & SPALDING

Attorneys for Petitioner Pandora Media, Inc.

19 BY: KENNETH L. STEINTHAL

JOSEPH R. WETZEL

20 JEFFREY S. SEDDON

21 PAUL, WEISS, RIFKIND, WHARTON & GARRISON

Attorneys for Defendant ASCAP

22 BY: JAY COHEN

DARREN W. JOHNSON

23 LYNN B. BAYARD

D98TPANA

(In open court, case called)

THE COURT: I have a motion for summary judgment, and I indeed have a draft opinion. And you probably know it's not my practice generally to have oral argument unless I need it. I actually am not quite sure that I have confusion about how to come out on the motion, but my concern is that I may not fully understand the context in which this motion is being made.

We have a trial coming up in December. As I analyze it, the particular issues presented to me are sort of driven by the unambiguous and clear language of AFJ2. So out of an abundance of caution that I want to make sure that I analyzed things with as much care as I would like to and am giving you the guidance you need as you prepare for trial and otherwise organize your lives, I sent out an order September 5th identifying seven questions I wanted counsel to be prepared to address. I think some of them reflect my confusion about why there is any confusion, since certain terms are confined in AFJ2.

And the result of the way I analyze AFJ2 in the context of this motion could be a fairly far-reaching one, more far reaching than is really requested by anyone. So as a result, I invited argument. I want you to feel free to address anything that you think would be helpful for me to hear, even if it doesn't relate specifically to the seven questions I posed, and I, of course, will feel free to ask you questions

D98TPANA

1 even if they're beyond the seven listed in the September 5th  
2 order.

3 Since it's Mr. Steinthal's motion, I suppose we should  
4 start with Mr. Steinthal, but I think we'll go back and forth  
5 until we have exhausted what I think is helpful to me at least.

6 Mr. Steinthal.

7 MR. STEINTHAL: Thank you, your Honor.

8 Your comments were right at the top of the list of  
9 what I was going to address, which is I'm quite mindful of the  
10 limited relief that we have requested upon behalf of Pandora.  
11 By the petition and by this motion, we invoked your  
12 jurisdiction over a proceeding which relates exclusively to  
13 Pandora and to scope of rights available under the consent  
14 decree license that Pandora has requested.

15 So at that level, the relief we're seeking is very  
16 limited to us. I'm equally mindful that in order to resolve  
17 the issues we have raised, there may be broader implications to  
18 others. There may be broader implications down the road. But  
19 to be very clear, we brought this proceeding because Pandora  
20 needed to have a determination of the scope and rate for the  
21 license it requested. It made its license request in late 2010  
22 for a consent decree license under Article 9 for the term  
23 1/1/11 through 12/31/15. And that is the jurisdiction we have  
24 invoked, and the relief we requested is specific to Pandora.

25 And that license now, obviously, your Honor, ASCAP's

D98TPANA

1 position, which is that it has been permitted to, in my view,  
2 eviscerate the scope of the license, and to come to question  
3 seven at some point, why it's so important to have this  
4 determination now, so we know what we're going to trial about.  
5 Because we need to know whether it's all the works in the  
6 repertoire at the time that we applied for the license, or is  
7 it what is left after not only withdrawals that we have seen so  
8 far, but also their scheduled withdrawals on October 1,  
9 scheduled withdrawals on January 1, can it be that ASCAP can be  
10 permitted to basically end up giving us just what is left,  
11 which could be less than 20 percent of its repertoire by the  
12 time we get to trial or shortly thereafter?

13 Those are issues that I clearly was going to raise  
14 anyway, that goes question seven, but I think your Honor's  
15 comments dovetail what I was going to say at the beginning,  
16 which is I can't worry about the fact that your Honor's  
17 resolution of our issues may have broader implications. If  
18 they do, they do. But in terms of the jurisdiction we invoked  
19 when we came here, we came here on behalf of Pandora for a  
20 blanket license request, and we need to determine what the  
21 scope of our license is and what a reasonable rate is for it.

22 THE COURT: Well, your statement -- and you put a lot  
23 of emphasis on January 1st, 2011 in your papers. Your  
24 statement right now is that whatever existed, the works in the  
25 repertoire as of January 1st, 2011 and the rights for the

D98TPANA

1 public performance of those works, has to be what you obtained  
2 for the five-year period. But that's really true, because you  
3 expect ASCAP to hopefully acquire new works. You hope that  
4 composers will keep composing and that those works will be  
5 added to the ASCAP repertoire. And you hope that your  
6 five-year license will give you the right to publicly perform  
7 those new works. And similarly, if a work was withdrawn from  
8 the ASCAP repertoire during the period of the five-year  
9 license, I don't see you making an argument that you would  
10 continue to have a license to publicly perform at that work if  
11 it were withdrawn in the middle of the five-year license.

12 MR. STEINTHAL: I address that in the context of your  
13 questions, but I agree with a hundred percent. It keys, your  
14 Honor, on the definition of a work. A work may be -- a writer  
15 may leave ASCAP at a given point in time and take works from  
16 ASCAP to BMI and vice versa.

17 The issue here is ASCAP's interpretation of its decree  
18 to permit it to, within the context of a single work, retain it  
19 in its repertoire for purposes of everybody else, but not to  
20 license that work to Pandora and a scant few others. That's  
21 the problem. The problem isn't -- we're not trying to argue,  
22 your Honor, that works are frozen in time, but the reality is,  
23 and I think your questions go right to the point, maybe I  
24 should dive right into the questions, answer them with the  
25 authority that I hope your Honor has already found and getting

D98TPANA

1 to the point where you've gotten. But to be very clear, I  
2 fully understand that if you agree with us as to the proper  
3 interpretation of what an ASCAP work is and what the ASCAP  
4 repertoire is under the ASCAP consent decree, it may be that  
5 this form of publisher withdrawal that permits ASCAP ostensibly  
6 to license some users with those works but not others with  
7 those works, it may very well be that the implication of all  
8 that is that these publisher withdrawals can't withstand  
9 analysis under the consent decree.

10 Our petition was focused on our circumstances. So  
11 that as you'll see when I do the argument here, the position  
12 under Section 6, and you asked that question under Section 6 of  
13 the decree, that's the provision that it's an absolute  
14 mandatory obligation on the part of ASCAP to license all works  
15 in its repertoire upon request. So if you find that the  
16 repertoire consists of works -- not of rights, but of works,  
17 then I think for sure our view is these publisher withdrawals  
18 are problematic under Section 6. But under Section 9 we come  
19 to you with a specific rate court request, and under Article 9  
20 we have again requested a blanket license to cover all the  
21 works in the ASCAP repertoire effective with our application  
22 date. That's the reason I focus on January 1, 2011.

23 Clearly when we talk about the purposes of the decree,  
24 one of the purposes of the decree and one of the central  
25 provisions of the decree is your Honor's jurisdiction to

D98TPANA

1 oversee ASCAP's licensing and to set rate determinations when  
2 agreed users can't reach an agreement. How can it be that we  
3 have unequivocally -- when we made the request, we had a  
4 license to all the works in the ASCAP repertoire. Not even  
5 ASCAP argues that effective January 1, 2011, the EMI works or  
6 the Sony works or the Universal works, whatever, they were all  
7 part of the repertoire as of that date.

8 The implication of ASCAP's position is that we can  
9 effectively deprive you of the Article 9 right that you have  
10 for a rate setting to the works in the ASCAP repertoire when we  
11 applied. That's a more limited argument, your Honor, than  
12 whether all of these publisher withdrawals can't be sustainable  
13 under the decree. I could argue the latter point, and I think  
14 the implications of our arguments are that there are very, very  
15 serious problems under Article 6 with this form of partial  
16 withdrawal.

17 If you want to me to address those, I will deal it in  
18 the context of the questions that you raised, but I want to  
19 make it clear we had an exchange of correspondence about what  
20 in the case was about and wasn't about in the context of  
21 counsel for some of the publishers. Our view is very, very  
22 straightforward to your Honor. We're here because we have a  
23 specific petition pending. But the implications of our  
24 arguments, to the extent they have implications broader than  
25 our circumstances, they are what they are.

D98TPANA

1 THE COURT: Well, I understand that you intend to  
2 honor your direct licenses with publishers such as EMI, and you  
3 do not want to be heard to be in anticipatory breach of them or  
4 anything like that. But I don't understand how I can respond  
5 to your motion for summary judgment here without addressing the  
6 larger issues. I don't think I can just confine myself to a  
7 January 1, 2011 analysis. I think any construction of the  
8 terms of AFJ2 necessarily requires me to work through what each  
9 of the definitions mean, what rights must be granted and were  
10 granted by license effective January 1, 2011, and let the chips  
11 fall where they may with respect to the outcome of that.

12 Let me ask you then, and this sort of focuses on  
13 question seven. At the trial in December I'm going to be  
14 deciding a rate. An appropriate rate for what? I'm not going  
15 to be deciding, I think, an appropriate rate for one point in  
16 time, January 1, 2011. I'm going to, I assume -- and I'm very  
17 anxious for counsel to address this, but I'm going to be  
18 deciding a rate perhaps as of January 1st, 2011 but for a  
19 five-year license for an understanding of the value of a  
20 five-year license as of January 1st, 2011. So aren't I going  
21 to have to value a rate? Is it for just a one-day point in  
22 time a five-year license rate?

23 MR. STEINTHAL: No, your Honor. That's why I think  
24 it's so imperative that you make this ruling now and define for  
25 us what is in the repertoire and what's not. ASCAP's view



D98TPANA

1 seems to be that they can indeterminately have a repertoire the  
2 size of X or X minus A or X minus B or X minus A, B and C and  
3 it doesn't matter, we don't have to know before we get to trial  
4 what we're valuing. Your Honor, that's particularly  
5 problematic. Let's assume -- we know who has made ostensible  
6 withdrawals, and if you add up the scope of the repertoire to  
7 EMI and Sony and Universal and Warner/Chappell and BMG, you get  
8 to the point where you're way blowing way past half and closer  
9 to three-quarters of the repertoire.

10 Now it is impossible in my view, your Honor, going to  
11 trial not knowing what the repertoire is that we're trying to  
12 set fees for. If we're left with -- and I hate to use this  
13 kind of pejorative word, but let's say the scraps, let's say  
14 all the good stuff has been pulled out, if their position is --

15 THE COURT: Why don't we say the big publisher stuff  
16 has been pulled out.

17 MR. STEINTHAL: OK. There's been no showing -- we  
18 need to know -- they're going to make a showing that what is  
19 left is of equal value and equal quality to what had been  
20 pulled out. We have never had a proceeding like this, your  
21 Honor. In the *DMX* case you were very careful when you were  
22 looking at a portion of the repertoire as a potential benchmark  
23 to evaluate the quantity of those works. Were they  
24 representative of the rest of the works in the repertoire?

25 In my view, this case is about all the works in the

D98TPANA

1 repertoire, and the publisher withdrawals should be ineffectual  
2 at least as to Pandora which applied for the license at a time  
3 before any of the withdrawals took place. So I have a lot of  
4 views about the phrase "at the relevant time," but one of my  
5 views is the relevant time, if it matters at all, was when we  
6 made the application, and you can't pull out the rug out from  
7 under our license after we made our consent decree application.

8 So my view is we go to trial and evaluate the entirety  
9 of the license, because that's the entirety of the repertoire  
10 at the time we made our application. ASCAP's view is this is a  
11 moving target. By the time we get to trial, your Honor, who  
12 knows what's going to be there?

13 I need to know as a litigator, for example, and you  
14 need to know as the rate setter: Do we have an issue here over  
15 whether what is left in the ASCAP repertoire is representative  
16 of the content that's been pulled out? Maybe all the good  
17 stuff has been pulled out. That has profound implications on  
18 what the value of the rest is. We need to know, and it can't  
19 be a moving target.

20 In our view -- and this is a view that would have an  
21 impact on anyone else that files a rate court application -- at  
22 a minimum, at the time that they made their rate court  
23 application and relied upon Article 9 as a vehicle to have a  
24 determination made of the rate for the repertoire, they were  
25 entitled to have that day. It can't be consistent with the

D98TPANA

1 pro-competitive and antitrust enforcement goals of the decree  
2 to permit ASCAP and its members to circumvent your Honor's rate  
3 setting authority. And that's exactly what is happening here.

4 THE COURT: Well, if you could just return to this  
5 question of the scope of the question I'll be asked to answer  
6 in December when I conclude what the right rate is, what am I  
7 looking at? I understand you want me to think about the  
8 repertoire as it existed on January 1st, 2011, but it's for a  
9 five-year license. And so to the extent a court can, I  
10 assume -- and this is the same way the parties, if they were  
11 negotiating, they would be sitting across a table from each  
12 other and they would be saying: OK, we're negotiating a rate  
13 today and it's going to be inserted into a contract, a license  
14 but it's for a five-year period. So the fair rate over a  
15 five-year period is perhaps different than what it would be if  
16 it were just a license for one day, today, because we project  
17 over this five-year period the industry is going to grow or  
18 shrink in the following fashion, music has become more or less  
19 valuable because of the following usages, the repertoire is  
20 going to grow or shrink because of the following whatever. And  
21 therefore, even though we're setting the rate today and it's  
22 going to be fixed in a document and govern this for five years,  
23 we have to make an assessment about what it's capturing over a  
24 five-year period.

25 Is that fair or not fair from your point of view?

D98TPANA

1 MR. STEINTHAL: I think it is fair, and I think the  
2 key is to talk about it in the works in the repertoire.  
3 Because as I said earlier, if a given writer exits and goes to  
4 BMI or SESAC, there is going to be that flow back and forth,  
5 and that tends to balance out over time. The works we're  
6 talking about here are not exiting, they're still there.

7 THE COURT: Yes, I'm with you there.

8 So is there a mechanism -- and I know that I'm about  
9 to hear from ASCAP, so it can fill me in on all the sort of  
10 more practical aspects of this, but from your knowledge on  
11 behalf of your client in dealing with ASCAP in negotiations  
12 like this, is there a discussion about the fact that the  
13 repertoire is likely to shrink or grow over the five-year  
14 period or certain music uses are going to become even more  
15 valuable or less valuable over five-year period?

16 MR. STEINTHAL: I think, your Honor, the answer is in  
17 the history of ASCAP they have always issued blanket licenses  
18 subject to an occasional direct license here and there. A  
19 direct license, unlike these direct licenses, because the works  
20 remained in ASCAP's repertoire in full. So I think that in the  
21 normal negotiation there's an expectation that all of the works  
22 in the ASCAP repertoire, subject to some movement in and out,  
23 will be there, and because it's a blanket license, what goes  
24 up, what goes down, you're paying for what ASCAP always told,  
25 access, immediate access, indemnification.

D98TPANA

1           And I could point you to the justificatory memo of the  
2 government back when AFJ2 was determined, and they too spoke  
3 specifically of some of the values of the blanket license. And  
4 in particular -- and this is important to your question that  
5 you just raised, and this is on page 8 of Exhibit K to ASCAP's  
6 brief, it refers to: In addition, the PROs' practice of  
7 offering blanket licenses can benefit users by providing broad  
8 indemnification against infringement; immediate access to works  
9 as soon as they are written; and flexibility in making  
10 last-minute changes in performances.

11           Your Honor, those are some of the values you heard  
12 from ASCAP time and time again of the blanket license. Those  
13 values are being, if not totally, substantially eviscerated.  
14 If what we have left is a tiny fraction of the repertoire that  
15 we have come to know and license in prior proceedings before  
16 the rate court and in negotiations. Some of the very -- that's  
17 why we need to know now, and I believe if you accept our  
18 position -- and as I said, this position may have broader  
19 impact to others, but for me, my mother used to say: I don't  
20 care about others, I only care about you. I only care about  
21 Pandora right now, and I care about the fact that we relied on  
22 Article 9 of the decree in bringing a proceeding, and at that  
23 time we were entitled to all the works in the repertoire. And  
24 let's talk about those definitions in a moment. There's no  
25 question, your Honor, no question at all, that all of these

D98TPANA

1 works were in the repertoire before these so-called publisher  
2 withdrawals of new media transmission rights occur.

3 So even if the publisher withdrawals might be  
4 consistent or whatever the word is with certain provisions or  
5 interpretations of the decree, it's not consistent with Article  
6 9. And so the combination of Article 6 and Article 9, the  
7 mandatory provisions of Article 6 requiring ASCAP to issue a  
8 license to any user for all works in the repertoire, coupled  
9 with Article 9, which gives us the license from the point in  
10 time when we apply until the proceeding is over, you can't pull  
11 the rug out from under that license.

12 And your Honor, I understand there are broader  
13 implications, and I will come to that, but all you say right  
14 now is I agree with that proposition, you can't pull the rug  
15 out under the combination of Article 6 and Article 9, you can't  
16 take away that Article 9 right from a licensee.

17 THE COURT: Well, I don't know. It seems to me if EMI  
18 had withdrawn entirely and taken all of its works away from the  
19 repertoire in the middle of your license period, I think that  
20 your license wouldn't cover those works.

21 MR. STEINTHAL: And your Honor, as I said, there is  
22 going to be -- subject to certain provisions of ASCAP's own  
23 making, and that's the issue of whether they're going to treat  
24 certain entities as having the rights to their repertoire until  
25 the duration of an existing license, put that aside, that's not

D98TPANA

1 the issue on this motion really. The question is if the works  
2 were removed in their entirety, I would tend to agree with you,  
3 that it's the prerogative of a member to withdrawal entirely  
4 from ASCAP. It's not the prerogative, as long as we live under  
5 AFJ2, to leave the works in for everybody else and deprive them  
6 to Pandora. It's just not. And it's especially so because it  
7 will pull the rug out from under an existing licensee with a  
8 consent decree license.

9 That's why I'm saying, your Honor, you could decide  
10 this limited to the Article 9 issue. We can't allow an entity  
11 that relied upon Article 9, and on the day they applied they  
12 were entitled to all the works in the repertoire. And these  
13 works remain in the repertoire. They have not been withdrawn  
14 in full. They have not been removed. They're in the  
15 repertoire. We're spending a lot of time on very important  
16 issues without getting to the specific questions.

17 THE COURT: I'm sorry, that's because I keep  
18 interrupting you. But one of the themes of your briefing is a  
19 concern about being put in a disadvantageous position vis-a-vis  
20 your competitors who may be applying or may have applied for an  
21 ASCAP license post withdrawals. Did I understand that  
22 correctly?

23 MR. STEINTHAL: Well, our primary submission on that,  
24 your Honor, is our primary competitors are owned and operated  
25 by entities that are part of the RMLC, and the RMLC has been

D98TPANA

1 treated by ASCAP in a fashion whereby they have been permitted  
2 to make new media transmissions without being subject to these  
3 exclusions, and under a rate structure that is the rate  
4 structure that we believe is right or appropriate for Pandora.  
5 It is central to our position that one of the reasons why your  
6 Honor has to ultimately rule this way is because we would  
7 otherwise be discriminated against under the decree.

8 THE COURT: Yes, and I don't want to get into the  
9 discrimination issue. I am not going to enter a decision  
10 deciding summary judgment on a discrimination theory. There  
11 are too many facts in dispute and I couldn't do that. It's not  
12 a clear enough and pure enough legal issue for me.

13 But I had read your brief, and I think maybe now  
14 incorrectly, to be concerned about a different issue, that is,  
15 that new media music users would seek an ASCAP license after  
16 these withdrawals and have a substantially different rate and  
17 you would be competitively disadvantaged because of that.

18 MR. STEINTHAL: Your Honor, our competitive  
19 disadvantage would be relative to our primary competitors.  
20 Hypothetically -- I'm not following that question, because our  
21 view is our primary competitors are broadcast radio entities  
22 with whom we compete for audience and ad revenue and the  
23 internet radio services primarily owned by them. So the  
24 reality is the entities that have stand-alone internet radio  
25 operations have primarily up to this date been owned by



D98TPANA

1 entities owned by the RMLC.

2           You're postulating something else, which is what about  
3 the other poor guys, that if they're not treated as standard  
4 services -- and many of them have been, so they're getting a  
5 full blanket license from ASCAP. They're being treated  
6 differently than us in the sense that they're being given  
7 access to the whole repertoire not subject to these withdrawals  
8 because they're tiny, and because the publishers basically  
9 don't want to go through the trouble of licensing them. So  
10 you're correct, maybe the passage that you're referring to is  
11 that we say that we're being discriminated against in two  
12 respects, against the RMLC entities, who are our primary  
13 competitors, and even against the smaller internet-only guy who  
14 are being treated to standard services because they don't get  
15 subjected to the publisher withdrawals.

16           THE COURT: Thank you.

17           MR. STEINTHAL: So let me try to quickly go through  
18 some of your questions. And I have a lot to say, but I'll try  
19 make it quick.

20           The first three questions, your Honor, are quite  
21 interrelated, and what I thought I would do is address question  
22 three first because it's just the shortest and simplest, and  
23 then go back to one and two.

24           So your question three was whether the term "works" as  
25 used as throughout means compositions or rights in

D98TPANA

1 compositions. This is governed squarely by the four corners  
2 the of the decree. We don't have to go anywhere else. Section  
3 2U, a work means any copyrighted musical composition, quote,  
4 unquote. There's no ambiguity, it doesn't turn on who the user  
5 is, doesn't turn on what medium the user is in, it is what it  
6 is. The term rights and compositions to which your question  
7 addresses is nowhere used in the decree ever.

8 Reading "works" to mean rights in compositions also  
9 would lead to some incomprehensible matters within the decree.  
10 For example, ASCAP repertoire would be defined as those rights  
11 in compositions, the right of public performance of which ASCAP  
12 has or hereafter shall have. You can't have a right of public  
13 performance of a right. It just makes no sense. Substituting  
14 rights in compositions for the word "works" elsewhere in FLJ2  
15 elsewhere similar result. I refer to section 2H, 2L, 2P, 2R,  
16 Section 6, Seven 7, Section 9 in various places. This one is  
17 lock, stock right there, your Honor. There's no question as to  
18 question number three.

19 So let me move to question number one. The question  
20 here, your Honor, was whether a musical composition, which  
21 ASCAP has the right to license to traditional media users but  
22 not to new media users constitutes a work in the ASCAP  
23 repertoire in the meaning of the second amended final judgment.

24 Our answer is yes. It is a work in the ASCAP  
25 repertoire. Any composition ASCAP can license to its

D98TPANA

1 traditional licensees but purportedly is no longer licensable  
2 to new media services is unequivocally still a work in the  
3 ASCAP repertoire. There is no basis in the decree to carve up  
4 a work by user, by medium or otherwise. Never does the decree  
5 speak to portions of a work or to segregable rights within a  
6 unitary work. It is what it is.

7 The proof is in the pudding as well. ASCAP has  
8 conceded over and over again that the works remain and the works  
9 purportedly withdrawn remain works in the ASCAP repertoire, and  
10 that the publisher withdrawals have not resulted in making them  
11 outside of the ASCAP repertoire. If you go to the ASCAP web  
12 site, and we cite this in our reply brief, once you registered  
13 your works with ASCAP, they become part of the ASCAP repertoire  
14 for which we collect performance royalties. It's as simple as  
15 that. If it's a work, an ASCAP work, it's in the repertoire.  
16 There's no way to divide it up.

17 There's also something called the ace database  
18 available on the ASCAP web site which says it is a searchable  
19 database that contains information on compositions in the ASCAP  
20 repertoire. All of the supposedly withdrawn works of BMI and  
21 Sony remain listed. They have an asterisk which says they may  
22 not be available to certain licensees, but are they listed as  
23 works within the ASCAP repertoire? Absolutely, your Honor. No  
24 disputing that they are.

25 If we look at the definition of blanket license under

D98TPANA

1 the decree, blanket license, quote, unquote, authorizes the use  
2 of ASCAP music. What is the definition of ASCAP music? ASCAP  
3 music in 2B means any work in the ASCAP repertoire. It's all  
4 quite circular, your Honor, in the sense that it all comes back  
5 to one thing, the repertoire consists of works. The works are  
6 not divisible.

7 So the answer to this question, and I -- there are a  
8 couple of other things I could refer your Honor to, but for  
9 now, I think unless your Honor has any question about that  
10 particular issue, we have cited in our brief the portions of  
11 the RMLC ASCAP agreement that make no sense if the answer to  
12 this question is anything other than its a work in the ASCAP  
13 repertoire. There's a difference -- and even ASCAP has  
14 recognized this, there's a difference between rights in a work  
15 and works, and the decree speaks only of works.

16 Let me move to question number two, and again, this is  
17 all interrelated. The question is whether in the AFJ2 section  
18 2C definition of ASCAP repertoire as, quote, those works the  
19 right of public performance of which ASCAP has or hereafter  
20 shall have the right to license at the relevant point in time  
21 the phrase right to license means the right to license to any  
22 user or the right to the license to a specific applicant.

23 Obviously, our view, and we believe it is clear within  
24 the confines of the four corners of the decree, it means the  
25 right to license any user. Repertoire, as I said, is defined

D98TPANA

1 by reference to works. Even in this definition, it's defined  
2 as those works defined by reference to works. Works are  
3 compositions, they're decidedly not subsets of rights within  
4 compositions.

5 I think one thing that we didn't address in our brief  
6 that might be informative here, there's a definition in the  
7 decree for right of public performance. Neither party gave any  
8 attention to this in their brief, but if you look in 2Q of the  
9 decree, this is the only place really where you see what does  
10 the word right mean when it's used in the decree? This is what  
11 it means. The right of public performance to which the  
12 definition of repertoire refers is itself a defined term. It  
13 means "the right to perform a work publicly in a non-dramatic  
14 manner," which it then refers to as the small performing right.

15 This is meant, your Honor, to be explicit in limiting  
16 the sole type of copyright right that ASCAP may license, the  
17 small performing right. This distinguishes is from the grand  
18 rights that you heard about from time to time, such as live  
19 theater performances that ASCAP does not license or sync rights  
20 that ASCAP does not license. So the right of public  
21 performance is a defined term in order to clarify that ASCAP  
22 licenses non-dramatic performing rights only.

23 So back to your Honor's question whether AFJ2's  
24 definition of the ASCAP repertoire, insofar as it refers to  
25 those works that ASCAP has the, quote, right of public

D98TPANA

1 performance, that defined term to license, your question was  
2 whether the phrase right to license means the right to the  
3 license any user or the right to license to a specific  
4 applicant. And the answer is very clear, there is no  
5 delineation, there's no limitation by user anywhere in the  
6 decree. This reference to the right of public performance is  
7 to the limitation on ASCAP's overall licensing power, which is  
8 to license non-dramatic performing rights. There's nothing  
9 that would permit the interpretation that ASCAP is permitted to  
10 limit it by user or by medium.

11 The full answer, apart from looking at these  
12 definitions of terms, now let's look at your question more  
13 broadly in the context of the degree. Article 6 is the answer.  
14 Article 6 says, quote, ASCAP is hereby ordered and directed to  
15 grant to any music user making a written request there for a  
16 non-exclusive license to perform all of the works in the ASCAP  
17 repertoire. Any music user, your Honor. Doesn't say to a  
18 specific applicant. Any music user and all of the works in the  
19 ASCAP repertoire.

20 We were trying to find some things we could focus you  
21 on that were in the public record. So I'm going to ask your  
22 Honor to take a look at a presentation made in early 2011 by  
23 ASCAP's then general counsel, which I think makes unequivocal  
24 the point we're making about Article 6. And this is  
25 presentation that was given at Columbia Law School. This just

D98TPANA

1 puts the nail in the coffin on this whole argument about so far  
2 as it corroborates exactly what the decree says.

3 If you look at the first full slide, it says an ASCAP  
4 license unappreciated and undervalued. A license application  
5 frees music users to perform publicly all the 8.5 million works  
6 in ASCAP's repertoire. Then it goes on, and then if you turn  
7 the page after talking about the immunization and preclearance  
8 transaction cost savings, what is the source of this freedom?  
9 This is a really interesting question and answer. What is the  
10 source of this freedom? Answer: ASCAP's consent decree.

11 Article 4, which I think is a transposition, it should say  
12 Article 6, the second amended final judgment, and then quotes  
13 exactly the passage in Article 6. ASCAP is hereby ordered and  
14 directed to grant any music user making a written request there  
15 for a non-exclusive license to perform all of the works in the  
16 ASCAP repertoire.

17 So it's crystal clear, your Honor, both in Article 6  
18 and in what ASCAP's then general counsel was referring to as to  
19 how the decree effects ASCAP's licensing, that the answer to  
20 this question had to be any user, not to a specific applicant.

21 Now let's move to question four, whether AFJ2 6 -- and  
22 this is the nub of where we're getting, your Honor -- prohibits  
23 ASCAP from accepting partial assignments of public performance  
24 license and rights in a composition and requires ASCAP to  
25 license either all public performance rights in a composition

D98TPANA

1 or no rights in a composition.

2 The import of our arguments about the definitions of a  
3 work, the definitions of ASCAP repertoire, the blanket license  
4 of ASCAP music, the implications of our argument coupled with a  
5 mandatory licensing obligation of Article 6 requiring ASCAP to  
6 license any music user all of the works in the ASCAP repertoire  
7 certainly suggests that the current consent decree language  
8 obligates ASCAP to license all rights, that there's no ability  
9 to license subsets of rights and works or subsets of media.

10 But to be clear, as I said at the beginning, your  
11 Honor, you don't have to go that far in order to give Pandora  
12 what it requests by its petition and in this case in the sense  
13 that we have requested a determination that our consent decree  
14 license cannot be diminished after the time we've effectively  
15 gotten our consent decree license. And so your question four  
16 is broadly: Are these publisher withdrawals permissible at  
17 all? That's how I read your question four. Can we harmonize  
18 this form of partial withdrawals that leave works in the  
19 repertoire unequivocally but purportedly allow ASCAP to license  
20 some users with those works and not others?

21 I think the implication of our arguments, if you  
22 follow them, it's problematic under Section 6 of those  
23 definitions. No question about that. Having said that, that's  
24 a broader issue. It's more than I need to bite off right now.  
25 I'm concerned, as I said before, about Pandora and what we came



D98TPANA

1 to your Honor for. You might say there are policy issues there  
2 I don't want to get to. You might, I don't know. I think the  
3 decree says what it says and the implications are what they  
4 are, and the Justice Department -- again, there's an  
5 interesting part of the Justice Department memorandum. If you  
6 turn to footnote 10 on page 9, in talking about the history of  
7 the decree, the Justice Department says technologies that allow  
8 rights holders and music users to easily and inexpensively  
9 monitor and track music evolves rapidly. It goes on and says  
10 the department is continuing to investigate the extent to which  
11 the growth of these technologies warrants additional changes to  
12 the antitrust decrees against ASCAP and BMI, including the  
13 possibility that the PROs should be prohibited from  
14 collectively licensing certain types users or performances.

15 It may be, your Honor, that there are policy reasons  
16 that would suggest the decree should be amended to allow ASCAP  
17 to do what it wants to do, but when we made our consent decree  
18 application, that wasn't the decree. And the decree as it now  
19 stands unequivocally says what it says. And so I think your  
20 Honor may very well believe that, just based on the definitions  
21 I have been talking about and Section 6, these withdrawals are  
22 problematic.

23 You may want to say that's broader than I need to  
24 worry about. Maybe I want more evidence on it. I don't know  
25 how your Honor is thinking about it. My point is that you

D98TPANA

1 don't have to go that far. I think on its face it's clear.  
2 These publisher withdrawals are problematic. I personally  
3 don't know how to harmonize the definitions I talked about and  
4 Section 6, the mandatory licensing obligation, with this form  
5 of partial withdrawal. I don't think it can be harmonized.

6 If you don't want to go that far, you don't have to.  
7 That was not our position going in. Our position going in was  
8 very simply this: We had a license to all the works in the  
9 repertoire on January 1st, 2011, and asked for and effectively  
10 got by complying with the notice provisions of Article 9 a  
11 license for the period January 1, 2011 to December 31, 2015.  
12 That license defined -- and again, this is where we'll talk  
13 about works may come and go, so that if a publisher withdraws  
14 or a member withdraws lock, stock and barrel and takes their  
15 rights and goes to license them through BMI or SESAC or on  
16 their own, not through a PRO that's what it is. But that's not  
17 what happened.

18 What happened is the works still reside in the  
19 repertoire, and what ASCAP is trying to do is say: I know I  
20 agree that on January 1, 2011 you had the right to perform all  
21 of the works on Pandora, and you were effectively licensed by  
22 virtue of your consent decree license. How can it be -- and  
23 this goes to part of the questions five and six and the purpose  
24 of the decree -- how can it be that Pandora can be punished by  
25 having exercised its right to apply for its license under

D98TPANA

1 Article 9 by having publishers selectively withdraw -- not  
2 remove, but selectively say to ASCAP: I'm not going to let you  
3 license them any more, those guys. Those are the guys that  
4 went to court to try to get a rate set. There's no way that  
5 could be harmonized with the purpose and intent of the degree.

6 That's why, on top of my concerns under Article 6 and  
7 the definitions I talked about, this is a subversion of Article  
8 9, plain and simple. Article 9 gives us the right to a  
9 license. 9A requires ASCAP to give a license to any, some, or  
10 all of the works in the ASCAP repertoire. 9E provides that  
11 pending the completion of any negotiations or proceedings  
12 regarding the reasonable fee for a license requested pursuant  
13 to 9A, the music user shall have the right to perform any,  
14 some, or all of the works in the ASCAP repertoire to which its  
15 application pertains. These provisions, your Honor, guarantee  
16 to music users like Pandora who requested blanket license  
17 pursuant to 9A, the absolute right to publicly perform all of  
18 the works that they request to license for. We requested a  
19 blanket license to all the works.

20 The language of AFJ2, your Honor, couldn't be any more  
21 clear that, we, Pandora, under Article 9, on top of all the  
22 other issues, the rate court jurisdiction can't be subverted in  
23 the manner that ASCAP is trying to do.

24 And that answers number seven. That solves the  
25 problem. Because if you agree with us that this can't happen,

D98TPANA

1 we can't have these sea changes in the size of the available  
2 repertoire between the time somebody has invoked the rate court  
3 protection and the time we get to trial, that's a simple  
4 ruling. It doesn't go as far as all publisher withdrawals of  
5 this nature can't be harmonized. This is a simpler, not as  
6 broad ruling that basically says you can't undermine Article 9.  
7 Whatever may be said about your attempt to do partial  
8 withdrawals under the decree, you certainly can't do it this  
9 way to an entity that at the time they applied for a license  
10 had a license to all the works in the repertoire.

11 Now let me come back to your question about what works  
12 that might be withdrawn midstream. If works are withdrawn,  
13 they're withdrawn. Historically works have come and gone.  
14 That balances out. That's not what is happening here. The  
15 works are still there, they're just not being permitted to be  
16 licensed to us. That's the problem. And the way it's been  
17 handled, we're going from an entire blanket license to all the  
18 works, to a hundred percent of the ASCAP repertoire at the time  
19 we applied, to what is likely to be less than 25 percent of  
20 ASCAP of that repertoire come next year. And how do we deal  
21 with that? How do you deal with that?

22 THE COURT: Well, I assume what you're asking then is  
23 that in the December trial I value a license for all the works  
24 in the ASCAP repertoire for all the public performance rights  
25 that ASCAP can give under the consent decree, and then you have

D98TPANA

1 separately paid for a license that was therefore unnecessary,  
2 and you're going to ask for an offset. I assume that's the  
3 math.

4 MR. STEINTHAL: Yeah.

5 THE COURT: And then if that's what happens, if, if,  
6 if, ASCAP receives less money from you, the major publishers  
7 who have already received these payments from you would not  
8 really, I suppose, in ASCAP's view, be entitled to  
9 reimbursement of your licensing fees. So your net payment to  
10 ASCAP is going to be distributed among the, let me just say  
11 smaller publishers and other artists who are compensated by  
12 ASCAP. But they're going to get a smaller percentage share  
13 than they would otherwise have received unless the rate set by  
14 this rate court is equivalent to the license you've paid to the  
15 large publishers, so that the offset is equivalent to what  
16 would have been distributed to the major publishers by ASCAP.

17 So now the smaller publishers and other artists within  
18 ASCAP have really been harmed, and the major publishers have  
19 been advantaged. Now ASCAP does or doesn't have contractual  
20 rights for reimbursement in these circumstances to make its  
21 other members whole, I don't know, but in some ways these  
22 practical issues that stem from these historical facts are not,  
23 I think, for me to figure out, they're ASCAP's problem. All I  
24 have to figure out is what is the right rate in December.

25 But one can't help but think about the practical

D98TPANA

1 implications of this. I assume, and we'll talk about this in  
2 December, but I assume from Pandora's point of view it would  
3 love the major publishers to stay within ASCAP. It's one-stop  
4 shopping, you negotiate and pay a single licensing fee and it  
5 covers the universe. You don't have to engage in separate  
6 negotiations. All the advantages that ASCAP offers the world  
7 of artists and publishers in terms of all those back office  
8 operations, collection and distribution, performed with  
9 relatively reasonable overhead, I guess. I don't really know  
10 I'm not asked to judge that right now, but let's just assume  
11 that, that the entire industry, both music users and the  
12 artists and publishers, are advantaged by having the mechanism  
13 provided by the PROs.

14 MR. STEINTHAL: May I respond?

15 THE COURT: Yes.

16 MR. STEINTHAL: I think the issue is in some cases not  
17 as complicated and not as simple as what your Honor said. In  
18 respect of what we expect would happen, assuming your Honor  
19 would agree with our position here, is that you would make a  
20 determination of the value of the ASCAP repertoire as if none  
21 of the publisher withdrawals have taken place. It's that  
22 simple in that respect. Then we don't have to get to the  
23 issues I was saying before, the moving target issue. That's  
24 problematic.

25 And if that is the case, if we have got to go to trial

D98TPANA

1 over what's left in the repertoire, either what's left as of  
2 December or after Warner/Chappell pulls out in January or  
3 whatever, that's a whole different level of proof that we would  
4 need to be prepared to adduce to you. And it goes to what the  
5 Justice Department was talking about and what your Honor was  
6 just talking about. There are certain benefits when all of the  
7 rights are available in one place. But those benefits are  
8 disappearing in a world if ASCAP's views about these publisher  
9 withdrawals are permitted to go forward.

10 So the simple part of it is if you agree with us on  
11 this motion, trial is much simpler. You're going to set a fee  
12 for the entirety of the ASCAP repertoire, and how we deal with  
13 the fact that we paid EMI and Sony for short period of time  
14 under direct licenses, I'm not sure exactly how we're going to  
15 do that yet, your Honor, but that's a separate issue, and I'm  
16 sure we'll be able to work it out, with your Honor's help if we  
17 need it. But it doesn't affect your rate setting as to what's  
18 the value of the blanket license to Pandora as if none of the  
19 publisher withdrawals had taken place. You've done this before  
20 in *DMX* where you had to factor in there was a direct license.  
21 These are different direct licenses, much more pernicious, as  
22 you'll see at trial, but still they're direct licenses, that  
23 money has been paid directly to certain publishers. We'll work  
24 that out. But from what do you have to do in terms of rate  
25 setting, it's fairly simple if you agree with us on this

D98TPANA

1 motion. You set the fee for the blanket, and if the parties  
2 can't agree on what to do about the Sony and EMI payments, then  
3 that's just a separate issue we'll have to address with you. I  
4 just don't know yet how we're going to deliver that to you.

5 You asked some questions about what happens with works  
6 in full that might be withdrawn. Again, it's not relevant to  
7 this motion, ASCAP has treated -- in its own internal rules it  
8 does basically tell its publishers and members that we will  
9 start dealing with the fact that you've withdrawn it after the  
10 duration of our license is in effect. So that is one little  
11 caveat that I think was worth mentioning.

12 And I think I have addressed the problems raised by  
13 question seven and one through four. And five and six, your  
14 Honor, purely straightforward. Yes, if there's any ambiguity  
15 in AFJ2, the Court may look outside the four corners of the  
16 decree for its purpose. I have already addressed some of the  
17 purpose issues including as for Article 9. There are others in  
18 the government's submission, AFJ2, supporting our  
19 interpretation of Section 6 as being a mandatory compulsory  
20 license to the full repertoire. I think it's on page 22 of  
21 their submission. It's a full repertoire mandatory license.

22 I would be happy to answer any more questions that you  
23 have, but I have been up for a long time.

24 THE COURT: Thank you, Mr. Steinthal.

25 Mr. Cohen, do you wish a break?



D98TPANA

1 MR. COHEN: No, I would like to proceed, your Honor.

2 THE COURT: Thank you.

3 MR. COHEN: If the Court needs a break we will.

4 THE COURT: No, I will take a break after you're  
5 finished and then we'll come back for further argument.

6 MR. COHEN: So your Honor, we appreciate you hearing  
7 us today and departing from your ordinary practice.

8 This does have profound implications. While  
9 Mr. Steinthal said five or six times he's only concerned about  
10 Pandora, that's not what this motion has transformed itself  
11 into. And that's problematic in a sense because the decree  
12 interpretation that is being suggested is not the decree that  
13 ASCAP thinks that it signed. And there are two parties to this  
14 decree, one of them is not Pandora, and the other party isn't  
15 here. And what's critical about that, and we should talk about  
16 that, because I will represent to the Court I talked to the  
17 Department of Justice as recently as a couple of days ago, and  
18 said you need to be here, because we at ASCAP don't think we  
19 ever entered into a decree that said that our members had to  
20 grant us all of the rights for all purposes or none of the  
21 rights. And that's what Mr. Steinthal posited, and I think  
22 that's your Honor is coming with the questions the works are in  
23 or out. That's not the decree that I believe we signed. It  
24 was not discussed at the time of AFJ2. I will go back, if your  
25 Honor will indulge me, when it was once in the decree, which

D98TPANA

1 was 1941 to 1950, but that's not the decree that we signed.

2 And with all due respect to the Court, the questions I  
3 think are chapter two. The chapter one is does the decree  
4 mandate ASCAP members or regulate what rights ASCAP's members  
5 will give to ASCAP? Does it require it to give it the rights  
6 to all of the works. And I don't see it in the decree, and I  
7 would respectfully suggest that what has happened in the last  
8 two and a half years suggests neither does the Department of  
9 Justice.

10 So let me back up. We went to the Department of  
11 Justice, as I said to your Honor before, in January of 2011,  
12 and said some of our members want to withdraw the new media  
13 rights. And if it were unambiguous in this decree that rights  
14 were in or out, it would have been a simple thing for the  
15 Department of Justice to say oh, no, no, no, that's not what is  
16 permitted under the decree.

17 THE COURT: If I remember correctly that affidavit  
18 didn't indicate what the Department of Justice said, it says  
19 what you said to them.

20 MR. COHEN: And I have a document, your Honor, that  
21 I -- I don't want to speak for the department, but let me say  
22 as much as I can say, because I had this discussion with them  
23 as well, and I think it's critical given the breadth of this  
24 ruling. They said to me you can't read anything from the fact  
25 that we did not say it was a violation of the decree.

D98TPANA

1 But I'm making a different point, your Honor, because  
2 this is a critical point of the decree interpretation that  
3 really has to be based on unambiguous language and giving  
4 meaning to an agreement that ASCAP and the DOJ think they  
5 entered into. And the point I'm making, your Honor, is if the  
6 Department of Justice thought that works were either in or out,  
7 and it was unambiguous under the decree, there's been two and a  
8 half years for the department to say that.

9 THE COURT: Now I'm sorry, but Mr. Cohen, the  
10 government is a busy institution.

11 MR. COHEN: But what I'm suggesting to your Honor is  
12 the government ought to be heard on this before your Honor  
13 rules is my respectful suggestion. I will deal with  
14 Mr. Steinthal's issue, because I don't think we need to resolve  
15 this on summary judgment.

16 THE COURT: You asked them to speak and they have  
17 declined to. Have they now told you they would like to?

18 MR. COHEN: They said they will respect the Court's  
19 wishes. They have not been invited by the Court to speak.

20 THE COURT: I know if I ask for them to weigh in, I  
21 expect, as a matter of -- well, as a result of many things that  
22 they would, but that's a little different from what I'm  
23 hearing.

24 Let me just be very frank, Mr. Cohen, because I'm  
25 trying to be very frank. You can tell from I think the seven

D98TPANA

1 questions that I don't find a lot of ambiguity here.

2 MR. COHEN: I understand, your Honor.

3 THE COURT: And I was very aware of the fact that I  
4 could ask for DOJ to be heard, and I considered doing that if I  
5 could find any ambiguity.

6 MR. COHEN: Let me try to suggest an ambiguity, your  
7 Honor, and see if I can turn you around, because I think that  
8 the decree says nothing about the scope of rights that have to  
9 be granted by an ASCAP member to ASCAP except for in Article 4.  
10 And in 4A, which I think is the critical language, it says  
11 ASCAP is enjoined and restrained from holding -- if you're with  
12 me, 4A -- holding, acquiring, licensing, enforcing or  
13 negotiating concerning any foreign or domestic rights in  
14 copyrighted musical compositions other than rights of public  
15 performance on a non-exclusive basis.

16 The import of your Honor's ruling, if you go the way  
17 that you very candidly have said that you're leaning, is that a  
18 member cannot restrict anything from ASCAP for any purpose. A  
19 member can say if I give you the work for some purpose, I  
20 cannot license it myself on an exclusive basis. I am EMI and I  
21 want to give the NBC television network the exclusive right to  
22 perform my songs on television. That happens in the rest of  
23 the world of rights. It happens in sync rights, people make  
24 exclusive deals all the time. Under this reading of the  
25 decree, if we're heading in this direction, that right has been

D98TPANA

1 taken away from the member. It has been taken away from the  
2 member. And the effective reading of the decree becomes: If  
3 you join ASCAP, and you give ASCAP non-exclusive rights, you  
4 cannot retain any exclusive rights for yourself. Now that was  
5 once addressed in the decree.

6 THE COURT: Well, I think it has to be not a member,  
7 but a work. You could be a member, I assume, I mean I haven't  
8 thought about this, and directly licensed rights to certain  
9 works but give ASCAP the authority, the licensing authority  
10 over other works. So I don't think a member is in or out for  
11 purposes of all works.

12 MR. COHEN: Then I think I misspoke, your Honor,  
13 that's not what I meant to suggest.

14 THE COURT: OK.

15 MR. COHEN: What I am saying is I don't see anything  
16 in this decree -- let me try to put it in real world context --  
17 that says somebody comes to ASCAP -- a new member, forget  
18 EMI -- and says I have a group of songs I want to license to  
19 the radio industry myself, I want you to license everyone else.  
20 I don't want you to license the radio industry. I do not  
21 believe the decree addresses that. And because those rights  
22 have not been taken away from the copyright holders, that are  
23 also sort of not here, but the copyright holders who think they  
24 can decide the scope of what they're going to give ASCAP to  
25 license. And the decree is silent on that.

D98TPANA

1           The effect of where your Honor is leaning,  
2       Mr. Steinthal's argument, is to say you can no longer do that.  
3       Because EMI's withdrawal is a bit of a misnomer. EMI's  
4       membership was up for renewal. And we had some testimony about  
5       this and some is restricted under the protective order, so I  
6       want to be careful. But EMI's membership was up for renewal,  
7       and they essentially, I would say, said I'm out and I'm giving  
8       you everything back but the right to license this class of  
9       music. And I don't think anything in the decree prevents that,  
10      that EMI has the right with respect to certain users to reserve  
11      for itself the exclusive right to license.

12           What Article 4 says, Section 4 of the decree says is  
13      ASCAP can't get exclusive rights. As long as ASCAP -- whatever  
14      rights ASCAP has, as long as they're non-exclusive, that's  
15      fine. But I see nothing in the decree -- and I'm going to come  
16      back to the '41 decree in a minute because I think it's really  
17      quite critical. I see nothing in the decree that says to a  
18      copyright owner if you let ASCAP license anybody, you have to  
19      let them license everyone.

20           Now we know that isn't true, because let's look at  
21      motion picture theaters. There's an express exclusion here.  
22      If I am the owner of the Lowe's 34th Street and I want the  
23      performing right for EMI's music. And I go to EMI and they say  
24      it's \$100,000. I say that's too much money, and I go to ASCAP  
25      and I say ASCAP, I would like to license the performing rights

D98TPANA

1 from you. These are works in the performance repertoire. All  
2 the songs I want are in the ASCAP repertoire and I want the  
3 right of public performance for my motion picture theater.  
4 ASCAP can't do that. The decree says they can't do that, they  
5 can't license to that class of user. That's by decree. So we  
6 know there are types of users that ASCAP can't license.

7 Let's look at 4F. I think that is also quite critical  
8 of the decree.

9 THE COURT: OK. I did not understand your example  
10 about motion picture theaters. What are you referring to?

11 MR. COHEN: In the decree, your Honor, I'm referring  
12 to 4E. My apologies, this is the so-called Alden-Rochelle rule  
13 you'll remember. So if a motion picture --

14 THE COURT: OK. So you're saying under 4E that there  
15 is a specific provision in the consent decree dealing with a  
16 class of users.

17 MR. COHEN: Correct. Which is inconsistent with the  
18 notion that a work is either in or out. It's clearly out with  
19 respect to this class of users. I understand the decree says  
20 that, I'm going to move on to the next example, which is 4F.  
21 And the second half of 4F says a member in interest -- let's  
22 call them EMI or Sony, since that's what we're talking about --  
23 irrespective of work -- but I don't think it's limited to one  
24 work -- can direct ASCAP to restrict performance of a work in  
25 order reasonably to protect the work -- and skip the first

D98TPANA

1 clause -- for the value of public performances rights therein.  
2 So EMI can say to ASCAP I don't want you to license any more  
3 these works, my works, to these users, because I think that  
4 will diminish the right of my -- the value, diminish the value  
5 of my public performance rights in my compositions. That is  
6 essentially what happened here.

7 THE COURT: Oh, no. No. In fact, I would say 4F is  
8 not very helpful to you.

9 MR. COHEN: Your Honor, let me try -- I think  
10 ultimately you'll have to decide, but let me try to articulate  
11 my argument a little more and see if I could be helpful.

12 THE COURT: OK.

13 MR. COHEN: What the publishers who ultimately  
14 withdrew their new media rights said was that we don't think  
15 ASCAP is deriving the appropriate value from the performance of  
16 our works by this class of users. So now the question is: Is  
17 there something in the decree that says works are either in or  
18 out, or is there some wiggle room in the decree with respect to  
19 works not being in or out?

20 And what I'm say willing to your Honor is the members  
21 have the right to direct not to license to specific users. And  
22 a user who said I have all of the works in the ASCAP repertoire  
23 because I have applied, has to confront Section 4F if a member  
24 says to ASCAP no, you may not license them. So those are works  
25 in the ASCAP repertoire for users, and the members have the



D98TPANA

1 right to restrict -- to instruct ASCAP to restrict those  
2 rights.

3 And what I'm suggesting to your Honor with respect to  
4 both Alden-Rochelle, 4E, and this provision in 4F is that the  
5 decree does not solely deal with works that have to be  
6 available to all users. That there are certain circumstances  
7 under which a work which is otherwise in the ASCAP repertoire  
8 is either not available to a class of users or to particular  
9 users at the direction of the member.

10 And that leads me back, your Honor, to where I  
11 started, which is does the decree tell us at all, does it  
12 say --

13 THE COURT: Excuse me one minute, I want to read 4F.

14 I don't think you had focused on 4F in your briefing.  
15 I'm sorry if you did and I overlooked a careful reading it.

16 MR. COHEN: We mention 4F in the brief but obviously  
17 your questions drew this out in more detail. It's in the 20s  
18 somewhere, maybe page 22 of our brief.

19 THE COURT: But this could be read to support  
20 Pandora's position that if the rights holder is concerned that  
21 there is indiscriminate performance of music occurring, the  
22 rights holder's options are to remove the work from the ASCAP  
23 repertoire or to ask ASCAP to restrict performance of the work.

24 MR. COHEN: Yes, I don't read --

25 THE COURT: It doesn't have this ASCAP can continue

D98TPANA

1     unrestricted licensing for some music users and then we'll go  
2     and separately license others.

3             MR. COHEN: I understand that, your Honor. I would  
4     say two things in response, if I may. One, I think there are  
5     two clauses here, the indiscriminate performance is one clause.  
6     As I read 4F, it's a separate clause with respect to protecting  
7     the value because of the "or perform the value."

8             And the second thing I would say, what I am trying to  
9     respond to is: Does the decree unambiguously put works in or  
10    out for all users? And what I'm suggesting to your Honor is  
11    that with respect to 4E and 4F -- and you're right, we did not  
12    spend an enormous amount of time in our briefing, but I will  
13    try to be responsive to your Honor's question. With respect to  
14    4E and 4F, there are circumstances clearly contemplated by the  
15    decree where there are works in the ASCAP repertoire that ASCAP  
16    has the right to license it to some users and not to other  
17    users either by definition for motion picture theaters or by  
18    direction of the member.

19            That takes me back to 4A, your Honor, if I may, which  
20    is I would suggest that if the decree intended to say  
21    unambiguously -- intended to say unambiguously that members had  
22    to give ASCAP the right to license all users or none, the place  
23    for the prohibition would have been in 4A. Because 4A is the  
24    only place that governs the granting of rights that could be  
25    acquired from ASCAP from its members. And it says you can't --

D98TPANA

1 the only right that you can get is the domestic -- are domestic  
2 rights and copyrighted musical compositions, you can't get  
3 anything other than rights of public performance on an  
4 exclusive basis. Now that wasn't always true. If your Honor  
5 will indulge and me and I could hand up the 1941 decree,  
6 because I think the history of the decree matters here.

7 May I, your Honor?

8 THE COURT: Yes, absolutely.

9 MR. COHEN: And this is an exhibit to our papers, it's  
10 Exhibit H to Mr. Johnson's affidavit.

11 THE COURT: Do you have a second copy, please?

12 MR. COHEN: Yes, of course.

13 This is the 1941 decree. This is the original consent  
14 decree. And I want to focus your Honor, if I may -- I want to  
15 apologize for the typeface, it's not easy -- on section -- it's  
16 numbered kind of strangely, but on the second page, it's after  
17 Roman Numeral II, and the first paragraph is actually supposed  
18 to be numbered paragraph one, not I, so that's 2(1) and 2(1) --  
19 and this was not in the papers, this was in response to your  
20 questions. We did cite some part of this but not this  
21 particular section for this purpose, 2(1)(c). And your Honor  
22 could parse through the language, but what this says is the  
23 first part of Section 2(1) is a little like Section 4 of the  
24 current decree. It basically says ASCAP can only get  
25 non-exclusive rights. You can't get -- that's, of course, the

D98TPANA

1 fundamental antitrust rationale for why the Supreme Court said  
2 ASCAP was not a per se violation.

3 It then goes on to say in the rest of Section 2(1),  
4 notwithstanding herein contained -- or nothing, I'm sorry,  
5 herein contained shall be construed as preventing ASCAP from --  
6 I go to C -- prohibiting the members from issuing exclusive  
7 licenses to commercial users for using.

8 So in 1941, if EMI -- if EMI existed then,  
9 Warner/Chappell had come to ASCAP and said I'm giving you the  
10 rights of public performance, but except for, with respect to  
11 my example before, NBC television network, I have exclusively  
12 licensed TV to NBC, ASCAP could say you can't do that. That  
13 provision has been gone from the decree since 1950. It was  
14 removed in AFJ, it continues to be removed in AFJ2.

15 And the importance of it, your Honor, if you bear with  
16 me, because it's hard to work our way through the text of these  
17 things, but it's important to say since 1950 members have been  
18 free to give exclusive licenses to commercial users.

19 And I would say that is exactly what has happened  
20 here. EMI has essentially said, with respect to or EMI and  
21 Sony and whatever partners withdraw, with respect to this class  
22 of users, I am going to license that exclusively. I am giving  
23 you, ASCAP, a non-exclusive license with respect to everyone  
24 else. Under 1941 decree, that would not have been permitted.  
25 It is the only time there was a restriction on licensing by

D98TPANA

1 members.

2 And again, your Honor, I think that was what I meant  
3 by chapter one and chapter two is: Does the decree at all deal  
4 with the issue of what rights ASCAP members have to give to  
5 ASCAP, what rights to license? And I would say no. And the  
6 importance of that is I read every provision that Mr. Steinthal  
7 addressed, Section 9, Section 6, the various pieces of Section  
8 2 which I will deal with, is that a user is entitled to the  
9 full extent of the rights to license that ASCAP has, subject to  
10 these restrictions in Section 4.

11 So if ASCAP has the right to license only a class of  
12 users, that class of users gets all of the works in the ASCAP  
13 repertoire. But I don't see anything in the decree, and it has  
14 never been the understanding of ASCAP that the decree governs  
15 what the grant of rights are from ASCAP's members, the  
16 copyright owners, to ASCAP.

17 Now ASCAP has had conventions under its membership  
18 agreement. And let me give another example because I think  
19 we're treading into a thin factual record here with some very  
20 unintended consequences. When an ASCAP member joins, they give  
21 ASCAP the right to license not just in the United States but in  
22 the United States and abroad. And the decree you can see  
23 doesn't prevent any kind of foreign licenses. So Pandora could  
24 have come to ASCAP and said I want a license for the United  
25 States and for all of the rest of the world with respect to

D98TPANA

1 your members' music.

2           ASCAP members traditionally and historically -- this  
3 is not before your Honor in terms of papers, but you'll see it  
4 on the face of the membership agreement, which is Section 11 of  
5 the membership agreement, it's on the web site and I can  
6 provide a copy to your Honor, says that if you, a new member,  
7 if you have already exclusively given those rights to a foreign  
8 society, tell me which societies and which rights.

9           What does that mean? It means that for some works  
10 ASCAP has the right to license the whole world, and for some  
11 works ASCAP has the right to license only in that part of the  
12 world where the members have not already conveyed exclusive  
13 licenses. And what that means, your Honor, by definition, is  
14 that a work is not a work is not a work, that some works are  
15 available to all users, and some works are not available to all  
16 users.

17           And while I understand how your Honor has parsed its  
18 way -- the Court has parsed its way through this language, I  
19 think there is an enormous amount of context in the licensing  
20 history and in the fundamental purpose of the decree that is  
21 not being addressed.

22           So to go back now to your questions, how do I deal  
23 with the language that your Honor finds unambiguous, what I  
24 would say is to go back, for example, to the ASCAP repertoire,  
25 which I think everything flows from the ASCAP repertoire. And

D98TPANA

1 I'm not disputing that a work is composition. That's your  
2 third question. That's clearly it's defined. That's, of  
3 course, what it is.

4 THE COURT: OK. Well, in your briefs you --

5 MR. COHEN: If we were being ambiguous in our briefs,  
6 I withdraw that. 2U defines it as a work. There's absolutely  
7 no way for us to take a contrary position. I think it was  
8 because we were potentially so focused on license and effect,  
9 which I will get back to in a minute.

10 So 2C, which is really the first question you asked,  
11 means those works -- a work is a composition -- the right of  
12 public performance of which -- and I agree with Mr. Steinthal  
13 the right of public performance is a defined term -- ASCAP has  
14 or shall have the right to license. I don't find unambiguous  
15 in that the right to license means the right to license for all  
16 purposes for all of the reasons that I spent the last 20  
17 minutes on, that there are a host of the circumstances where  
18 ASCAP cannot license; cannot license movie theaters, can't  
19 license foreign rights that have already been conveyed, can't  
20 license what it has been told to restrict. And I see nothing  
21 in the decree that prevents a user from coming to say I can do  
22 this better than you can, with respect, or made a decision to  
23 license certain users before I decided to join ASCAP.

24 The other part of the decree that I think is  
25 consistent with our reading that all that we're licensing is

D98TPANA

1 the full extent of what we have -- and I will come in a few  
2 minutes to Mr. Steinthal's question how we deal with this in  
3 the trial, because I don't think it's complicated and I don't  
4 think it will advance the right to termination. I will come to  
5 that in a few minutes.

6 Let's go back to licenses in effect, and I think  
7 Mr. Steinthal made some important concessions today. Licenses  
8 in effect. Let's start with our licenses in effect, but I  
9 think it doesn't make a difference, which is it's limited to  
10 final licenses. Mr. Steinthal conceded today that users  
11 could -- members could withdraw works and repertoire would have  
12 of course be fluid over the course of a license period.

13 So he doesn't get all of the works in the ASCAP  
14 repertoire on the first day that he applies for a license, even  
15 if it's the interim license which governs licenses in effect.  
16 So if the ASCAP repertoire had to be the same for all users,  
17 there would be no concept of licenses in effect because  
18 depending upon the time in which a licensee applies or a user  
19 applies, which license in effect will be different for  
20 different users. If I apply the day before EMI withdraws --  
21 entirely forget the new immediate withdrawals, if I apply the  
22 day before EMI withdraws, I get all EMI's music. If apply the  
23 day after, those songs are still in the ASCAP repertoire for  
24 the people who applied the day before the withdrawal, because  
25 their license is in effect, but they're out of the repertoire



D98TPANA

1 for users who apply after the effective day of withdrawal.

2 Again, the decree is much more complicated than is a  
3 work in or is a work out. It's what is the scope of licensing  
4 rights that have been granted to ASCAP. And ASCAP must convey  
5 to Pandora and everyone else all the rights that it has. But  
6 those rights do not need to be and have not been all of the  
7 rights in all of the works that its members have created.

8 So that flows through, from my perspective, to all of  
9 these questions. Everything is tied to what is the ASCAP  
10 repertoire. And what I would say, your Honor, is 2C says it's  
11 the right of public performance, works, the right of public  
12 performance of which ASCAP shall have the right to license.  
13 And if a member says you have the right to license certain  
14 rights of public performance but not other rights of public  
15 performance, we reserved that for ourselves. We want to deal  
16 with that ourselves. There is nothing in the decree that says  
17 that the member can't make that decision.

18 And if the Department of Justice had intended to  
19 extract from ASCAP and its members an agreement that works  
20 would be in for all purposes or out for all purposes, the place  
21 to do it would have been in Section 4 where it describes what  
22 the relationship is with respect to the rights that ASCAP can  
23 obtain. And ASCAP could have been enjoined from obtaining less  
24 than the full performing rights for all possible users, but it  
25 wasn't. And since 1950, when that provision of the 1941 decree

D98TPANA

1 that I mentioned had ceased to be part of a consent decree, the  
2 members, the copyright owners, have had the right to make their  
3 own decision.

4 ASCAP is a licensing agent. ASCAP is a licensing  
5 agent. The principal, the copyright owner, can decide what it  
6 wants to have its licensing agent license. What ASCAP is  
7 precluded from doing under the decree, except for some certain  
8 exclusions that we have gone through, like 4F, is from  
9 distinguishing between users with respect to the full range of  
10 what it has been authorized to license. That's what the users  
11 get. They get the entire ASCAP repertoire, which are the songs  
12 for which ASCAP has the right to license public performance.  
13 It doesn't say all public performance.

14 And what I'm concerned about, your Honor, with respect  
15 to the reading of the decree, and I understand how your Honor  
16 parsed your way through the decree from your questions, is that  
17 we are fundamentally upsetting the -- unintentionally, the  
18 relationship between the copyright owners and ASCAP by now  
19 saying something that I think is just nowhere in the decree:  
20 To be an ASCAP member, you must let them license your works to  
21 anybody who comes along. And not only may you -- not only are  
22 you required to give them non-exclusive licenses, because  
23 that's what the decree requires, you can no longer reserve for  
24 yourself any of the licenses. I don't see how that makes sense  
25 under the decree particularly because what the decree is

D98TPANA

1 concerned about is the aggregation of rights. This is the  
2 disaggregation of rights.

3 And I want to say a few things about the purposes of  
4 the decree. Let me go there now. I think your Honor is free  
5 since the *Shenandoah* case in the Second Circuit that involved  
6 ASCAP and the *Armor* case in the Supreme Court and various cases  
7 that we cited on page 12 of our brief.

8 Your Honor can look to extrinsic evidence to interpret  
9 the language, but I don't think we can broadly say we're going  
10 to do something that is consistent with the purpose of the  
11 decree. There's a lot of case law that says decrees don't have  
12 purposes. Decrees are agreements. They can't be stretched  
13 beyond their terms, which is the essence of what I'm arguing to  
14 your Honor is that we're heading into something that stretches  
15 the decree beyond its terms. But the purpose, whether it's  
16 pro-competitive or anticompetitive or consistent with the  
17 marketplace for performing rights, is not something that your  
18 Honor should turn to in the interpretation of the decree.

19 Having said that, I will give my view about the  
20 purpose in case your Honor disagrees. These new media  
21 withdrawals are entirely consistent with the purpose of the  
22 decree. The decree is designed to constrain ASCAP's market  
23 power and to encourage direct licensing. And these members  
24 have pulled out of collective licensing for certain purposes.  
25 In the same way that the courts have over and over and over

D98TPANA

1 found the program license to be a bridge to direct licensing,  
2 this is a bridge to direct licensing. Would it be more  
3 consistent with the decree, if we can use that language, for  
4 EMI to withdraw entirely? Perhaps. But anything that  
5 disaggregates rights from ASCAP and requires users and  
6 copyright owners to license those things directly is exactly  
7 what the decree is intended to accomplish.

8 And that's the irony of where we are. Mr. Steinthal  
9 is saying I want ASCAP -- for 50 years of great court  
10 litigation the users have come in and said we have to constrain  
11 ASCAP, we have to encourage direct licensing, we have to allow  
12 direct licensing. We can't let ASCAP aggregate these rights  
13 that's why the rate court is here. And now when someone  
14 disaggregates rights because the price happens to be higher --  
15 we'll deal with that at the trial -- they come in and say oh,  
16 no, you must stop direct licensing.

17 It doesn't make any sense, your Honor. Respectfully,  
18 it turns the decree on its head. It's completely consistent  
19 with the purpose of the decree to allow copyright owners to  
20 license directly. Whether those direct licenses will be  
21 benchmarks that your Honor will use at the trial, we'll get to.  
22 If they think that the behavior has been collusive, which I do  
23 not believe, they can bring a cause of action under the  
24 antitrust laws. But the fact of the matter is the decree  
25 encourages direct licensing, and that's exactly what is

D98TPANA

1 happening here.

2 Now let me go to the last point, the seventh question,  
3 if I may, because that's where Mr. Steinthal started, and I  
4 have a fundamental disagreement. He suggested to your Honor  
5 that the trial will be simpler if we now define the scope of  
6 rights and we resolve this on summary judgment. I don't really  
7 understand that, and let me tell you why.

8 Here's what I envision for how we would set rates, and  
9 I think it's very similar to what your Honor said, and it's  
10 similar to the agreements they entered into. The direct  
11 licenses that Pandora entered into says the fee overall for  
12 performance rights -- overall, not just you, Sony or EMI, is X  
13 percent, and you, Sony, will get some percentage of that  
14 overall value of performance of music based on the number of  
15 plays you have. So a simple adjustment mechanism.

16 And that's exactly, your Honor, what I think will be  
17 our proposal at trial. So if we have 25 percent or 50 percent  
18 or 37 percent of the plays on Pandora, it will self-adjust. It  
19 will adjust based on a mechanism. They will not have to pay  
20 twice. Nobody thinks they should have to pay twice for the  
21 same music. Nobody on the ASCAP side says the withdrawals are  
22 irrelevant to the value of the repertoire. Of course it's  
23 relevant to the value of the repertoire. But the way to deal  
24 with the dynamic repertoire over time is to decide what is the  
25 value of the performing rights. And they have done that in

D98TPANA

1 their licenses. They have said the amount of money that we're  
2 going to pay for performing rights is X percent. And if ASCAP  
3 has 20 percent, it gets 20 percent of X. If it has 40 percent,  
4 it gets 40 percent of X. If it moves over time, the fee to  
5 ASCAP is dynamic.

6 THE COURT: Mr. Cohen, I don't actually understand the  
7 formula.

8 MR. COHEN: Let me try again. I'm trying to, again,  
9 not to divulge in information under the protective order in  
10 open court. They entered into a license --

11 THE COURT: No, we don't need to do it that way, just  
12 what is ASCAP's proposal?

13 MR. COHEN: Forget what the percentage overall will  
14 be.

15 THE COURT: What percentage overall?

16 MR. COHEN: The percentage of their revenue. ASCAP  
17 will --

18 THE COURT: Of Pandora's revenue?

19 MR. COHEN: Yes, Pandora's revenue only essentially  
20 adjusted by its share of performances on Pandora.

21 THE COURT: ASCAP's share of performances.

22 MR. COHEN: Correct, exclusive of what's been directly  
23 licensed. So Mr. Steinthal said what if we only have  
24 20 percent of ASCAP's repertoire next year? You only pay us  
25 for what's left, so that if we have a 100 percent of the

D98TPANA

1 repertoire, we get a 100 percent of that number. If 50 percent  
2 of the repertoire has withdrawn its rights, we go to -- the fee  
3 that's payable to ASCAP goes down proportionately, so that  
4 we're taking into account in a dynamic way the size of the  
5 ASCAP repertoire, which as I say is a proxy for its value. I'm  
6 not saying there can't be complications of it, but that's the  
7 basic idea, that the rate should vary with either the size or  
8 the number of performances. So if ASCAP loses valuable parts  
9 of its repertoire, Pandora will pay less to ASCAP. Of course  
10 they will. And we don't need to decide in advance of the trial  
11 this question to achieve that kind of result.

12 And that's the way they have -- that's the  
13 significance of the licenses, your Honor, that's the way they  
14 structured their licenses. They structured their direct  
15 licenses to vary with the number of performances. We're  
16 prepared to live with that. We're prepared to buy into their  
17 structure. And if ASCAP's performances decline as a result --  
18 on Pandora as a result of the withdrawal of certain members in  
19 2014, or have declined over this period as a result of  
20 withdrawals in 2011 and 2013, that will be reflected in what  
21 Pandora pays to ASCAP, so that Pandora will get the benefit of  
22 the reduced repertoire and it will negotiate what it negotiates  
23 with the direct licensees. But we will not get paid for music  
24 that we no longer have.

25 THE COURT: So the focus is going to be not on valuing

D98TPANA

1 the music in ASCAP's repertoire at any point in time, but  
2 instead valuing the music that is on Pandora at some point in  
3 time.

4 MR. COHEN: And adjusting that -- I don't think  
5 anybody ever tried to -- I think what I'm suggesting, your  
6 Honor, is very consistent with kind of market share adjustments  
7 that have historically been done by the rate court. So if we  
8 go back to the *Showtime* decision, there was a BMI benchmark,  
9 and the rate court says ASCAP has 54 percent and BMI has 46  
10 percent, so we will adjust the BMI rate by the fraction of 54  
11 divided by 46.

12 I'm suggesting something similar to that, that we come  
13 up with benchmarks -- we think their direct licenses are  
14 benchmarks, but let's say we use music choice and say the right  
15 rate is 2.5 percent for ASCAP, but ASCAP has now lost half of  
16 its repertoire because of withdrawals in a given year, I would  
17 say -- don't hold me to this as our proposal, but this is the  
18 structure, that the rate is now 1.25 percent, that there has to  
19 be a reduction in half of the ASCAP rate to reflect the fact  
20 that half the repertoire has been lost.

21 So we don't need to answer, from my perspective, this  
22 question of what is in and what is out on summary judgment on a  
23 reasonably thin record.

24 THE COURT: Well, the 2.5 percent is based on the  
25 ASCAP repertoire as it existed January 1, 2011, and then if



D98TPANA

1 it's reduced behalf it's 1.25?

2 MR. COHEN: Yes, your Honor.

3 THE COURT: So you're saying that the value is as of  
4 January 1, 2011, and that's what we're measuring.

5 MR. COHEN: No, your Honor, I think the value changes  
6 all the time because there have been changes in the market. So  
7 it will be more complicated at trial. So there are market  
8 comparables. They entered into the licenses in '11, they  
9 entered into licenses, Pandora, in '13, direct licenses, and  
10 those numbers are different.

11 What I am suggesting is whatever the market value is  
12 in a given year, and we're likely to come to your Honor with a  
13 different rate for different years based on what we think the  
14 market is for performing rights at that time, there will be an  
15 adjustment to reflect the withdrawals. I mean Mr. Steinthal  
16 was suggesting, I thought, that ASCAP's position was that it  
17 makes no difference whether there have been new media  
18 withdrawals from the repertoire in terms of the fee that ASCAP  
19 is seeking to charge. That's not the structure of our fee  
20 proposal.

21 THE COURT: So your fee proposal is saying for each of  
22 the five years there may be a different value to music rights.  
23 For each of the five years we're going to do a calculation of  
24 the value of those music rights based on the January 1, 2011  
25 ASCAP repertoire, and then a separate calculation of the

D98TPANA

1 repertoire as it exists that very year.

2 MR. COHEN: I think not quite, but conceptually I  
3 think the same -- let me try this way. Let's assume that the  
4 market implies a value of -- I'm not only talking about ASCAP,  
5 let's say the market implies a value of ten percent or five  
6 percent for music performing rights. That what I can show that  
7 was paid by services like Pandora in a given year for all of  
8 the music performing rights they get from ASCAP, from BMI, from  
9 SESAC and direct licenses, is five percent. What I would say  
10 is that ASCAP has half the performances on Pandora, they get  
11 half of that five percent. If they only have a quarter of  
12 those performances because they have lost a bunch of music,  
13 ASCAP lost music as part of the new media withdrawal, it gets  
14 half of that 2 percent, it gets 1.25 percent, because its  
15 performances on Pandora have gone down and the value to Pandora  
16 of the ASCAP license has been diminished by the withdrawal of  
17 repertoire.

18 And we may start with a different baseline in each  
19 year depending, because the market has been evolving. Our  
20 concept of the fee is that there's a market rate and these  
21 withdrawn licenses have created a market for performing rights.  
22 And that rate has not been the same each year, so we would say  
23 what was the market -- just as one year it may cost \$100 a  
24 square foot to rent a store, the next year it may cost \$200 a  
25 square foot. So first, what's the market price, and then

D98TPANA

1 what's ASCAP's contribution to the value of music on Pandora?  
2 We're likely -- we're still refining it, the parties haven't  
3 exchanged expert reports yet, but it's coming -- we're likely  
4 to adjust based on performances, so that the rate we will  
5 propose will take into account the new media withdrawals.

6 And that's how Mr. Steinthal's client will be able to  
7 figure out what the fee is. And that's the kind of license  
8 they have entered into. They have entered direct licenses on  
9 precisely that basis. The value of music performing rights is  
10 X percent, and you, withdrawn publisher, get your share of that  
11 X percent. So I think it's exactly their structure, and  
12 therefore when Mr. Steinthal says we must have this decision  
13 before the trial because we won't know how to set a fee, I just  
14 don't think that's true. Because we are living -- we have  
15 worked very hard to live in a world where this repertoire is  
16 dynamic and they're not paying twice for the same music.

17 And the marketplace will dictate -- Pandora's users  
18 will dictate what is the value of the ASCAP repertoire, as  
19 opposed to the BMI repertoire or SESAC repertoire or any other  
20 repertoire based on the number of plays. And maybe we'll have  
21 a dispute about whether that's the right adjustment metric or  
22 they think it should be some other adjustment metric. But we  
23 don't need to resolve this question, which has enormous  
24 implications, enormous implications for ASCAP, its members,  
25 ASCAP's competitive position and fundamental decree

D98TPANA

1 interpretation to get to the trial.

2 I'm not suggesting, your Honor, that your Honor  
3 disagrees with everything I'm saying, you can't rule, but to  
4 the extent Mr. Steinthal says you must rule now because we  
5 won't know how to present a fee proposal at trial, I think  
6 that's simply not true. And we can propose a fee at the trial  
7 that takes into account the effect of these withdrawals.

8 And if ASCAP winds up with just the dregs -- I hate  
9 that word, but it's his word -- but if it's the dregs, it will  
10 be paid on the dregs. Because if the dregs don't get played on  
11 Pandora, Pandora is not going to be paid a lot of money to  
12 ASCAP in 2014 and 2015. The market will dictate. The markets  
13 of users will dictate what the value of these compositions are  
14 to Pandora, and we'll apply that against the percentage of  
15 their revenue only, which is exactly the way they have  
16 structured their mutual licenses.

17 So your Honor, I know it's been a long afternoon for  
18 your Honor. I think the fundamental decree point that I wanted  
19 to make is that the decree does not say anything that requires  
20 members to be all in or all out at ASCAP. They're allowed to  
21 reserve for themselves -- they have been since 1950 allowed to  
22 reserve for themselves certain rights that they don't want to  
23 grant to ASCAP. When ASCAP gets the grant that it gets, it's  
24 required under the consent decree to make all the works that it  
25 has the right to license for those kinds of users to that user.

D98TPANA

1 But if a member says I don't want you licensing broadcast  
2 television, I want you to license everything else, neither  
3 Section 6 nor Section 9 nor any of the other sections that  
4 Mr. Steinthal relied on requires that property owner to make  
5 ASCAP its licensing agent for all purposes.

6 THE COURT: Now before these partial withdrawals that  
7 are at issue here, was there any historical experience with  
8 that kind of conduct by members?

9 MR. COHEN: Only with -- no, your Honor, there was  
10 only respect to this question of foreign rights, but with  
11 respect to domestic rights, no. Because ASCAP, of course, is a  
12 membership organization. It didn't want to lose its rights.  
13 The members were content to give all those rights to ASCAP, but  
14 there are some examples. For example, I think in the  
15 advertising world, music on advertising, there are certain  
16 songs where members grant sync rights and performing rights and  
17 works that are otherwise in the ASCAP repertoire, but there's  
18 no withdrawal of this kind, certainly no withdrawal of this  
19 kind. But that's not a question of the decree, I would say,  
20 your Honor, that is a decision between ASCAP and its members as  
21 set by the ASCAP board. That's why ASCAP went to its board.  
22 The board actually debated whether it wanted, as a matter of  
23 its own policy, to allow for these partial withdrawals. That's  
24 a different question than saying the decree affirmatively and  
25 unambiguously requires the grant to be all or nothing.

D98TPANA

1 THE COURT: Even if I should find the decree  
2 unambiguous and rule along the lines that you fear, then  
3 ASCAP's recourse -- one recourse, besides getting me reversed,  
4 would be to talk to DOJ and to have another amendment to the  
5 consent judgment. Am I right?

6 MR. COHEN: Yes, of course that's always right. It  
7 took years to get to the last event. It took years and years  
8 of work, both because of the fact, as your Honor has already  
9 observed, DOJ is a busy agency that has a lot of things to do.  
10 There is a public process to it.

11 So one thing that I'm suggesting again, your Honor, is  
12 we should at least hear them out. I don't know which way  
13 they're going to come in. I'm not suggesting to your Honor  
14 asking you to get the DOJ to weigh in with their vote in my  
15 pocket. I don't have it; nor does Mr. Steinthal, I understand.

16 THE COURT: No, I assume, Mr. Cohen, if you had it, it  
17 would be have been in your papers.

18 MR. COHEN: Absolutely. And the same for  
19 Mr. Steinthal. Nobody has their vote. But I think it would be  
20 more efficient, given, one, the difficulties of getting your  
21 Honor reversed in the Second Circuit, and two, the difficulties  
22 of getting a decree amended, which it takes an enormous amount  
23 of time, before we rush to judgment on this issue. Let's hear  
24 from DOJ. Let's understand the full implications of what we're  
25 doing, and the only then remaining question is: Will that

D98TPANA

1 somehow impede the trial? And I'm suggesting to your Honor:  
2 No. They don't need this answer for the trial.

3 THE COURT: Well, I mean I would hope to have an  
4 answer from DOJ before the trial if we went that route.

5 So what is the question you would put to DOJ?

6 MR. COHEN: Well, I would put to DOJ the questions  
7 that are posed on summary judgment. There are a series of  
8 questions. The question that -- well, let's start with your  
9 questions. Your Honor has asked a series of questions which I  
10 understand your Honor to say leads you, unambiguous, to the  
11 conclusion that the decree unambiguously precludes the new  
12 media withdrawals. Obviously when we got your questions, it  
13 was not a cause for celebration on the ASCAP side, and we  
14 appreciate the opportunity to lay out our arguments.

15 I don't think that's the decree that we entered into.  
16 We'll have to see, DOJ may disagree agree with us. It would  
17 not be the first that the Department of Justice and ASCAP  
18 didn't agree on a question of interpretation. But I think,  
19 your Honor, at least hypothetically, if ASCAP and the  
20 Department of Justice both say to your Honor that we were the  
21 parties to the decree, we sat around the negotiating table.  
22 Maybe we did a bad job drafting here, but this is not what we  
23 intended. That may or may not lead your Honor to a different  
24 conclusion, but I think it would be an important piece of  
25 information for your Honor to have with respect to a decree

D98TPANA

1 interpretation which Mr. Steinthal says he only cares about  
2 Pandora, but will have unbelievable consequences for ASCAP,  
3 particularly because we don't know how the BMI decree will work  
4 out. So BMI has engaged in this same new media withdrawal, and  
5 ASCAP can find itself in a position, as soon as your Honor's  
6 decision is rendered, if it's rendered now, where ASCAP's  
7 members can't withdraw new media rights and BMI members can.

8 THE COURT: Well, I understand that what ASCAP was  
9 facing here was a total withdrawn by BMI.

10 MR. COHEN: Yes, your Honor.

11 THE COURT: Or a partial withdrawal, which was the  
12 compromise solution.

13 MR. COHEN: Total withdrawal an enormous blow to  
14 ASCAP, particularly if our friends at BMI -- at the moment  
15 they're in rate court at a very close stage with Pandora.  
16 There's no pending summary judgment motion before them. And  
17 they have, I understand, have effected new media withdrawals,  
18 the details of which I'm not conversant with, but my general  
19 understanding is it has the same effect.

20 So we could be in a period where, if members want to  
21 take out new media rights from ASCAP, they will withdraw from  
22 ASCAP and go to BMI because BMI permits new media withdrawals.  
23 That would upset the competitive landscape drastically, and I'm  
24 suggesting to your Honor that some degree of restraint, given  
25 all these ramifications, is worth considering.



D98TPANA

1 THE COURT: I'm going to have a rate court decision in  
2 December or January, whatever, trial in December. I have no  
3 idea what the appropriate rate should be. Nobody has gone to  
4 make submissions to me on that.

5 MR. COHEN: Yes, your Honor.

6 THE COURT: I don't think anyone could have any basis  
7 to anticipate that the rate will be too high or too low. I am  
8 tabula rasa on the rate. So I know December looks like months  
9 away, but it's really fairly close.

10 MR. COHEN: Painfully aware of that, your Honor, yes.

11 THE COURT: Let me suggest that the question we would  
12 ask DOJ is not what did you intend way back when, because --

13 MR. COHEN: I understand.

14 THE COURT: -- its lawyers are perhaps not there any  
15 more, and that's perhaps not the appropriate question. So  
16 we're going to take a break now, and I would like counsel to  
17 discuss with each other to formulate for yourselves and then  
18 discuss with each other if we were going to ask DOJ a question,  
19 a single question, hopefully, because I would like them to be  
20 able to actually answer this question before December, what is  
21 that question?

22 MR. COHEN: I think it might be question four, but I  
23 will be happy to talk to Mr. Steinthal. Because I think that's  
24 the fundamental question. The rest of it is the road map to  
25 get there, but if I'm correct that the decree allows a partial

D98TPANA

1 assignment of rights, then I think questions one, two and three  
2 have to be rethought. They would have to explain to your Honor  
3 why, of course. You're the arbiter of the decree, I understand  
4 that, I'm not suggesting they're binding, but I would think  
5 that would have some impact on your Honor, but I think it's  
6 question four. But I'm happy to speak to Mr. Steinthal now.

7 THE COURT: We'll take a recess.

8 (Recess taken)

9 THE COURT: Mr. Steinthal, did you want a right to be  
10 heard?

11 MR. STEINTHAL: Your Honor, we don't have an agreement  
12 on a single question to go to Justice. We each have a question  
13 that we drafted, and maybe we should come back to that at the  
14 end after I try briefly to respond to some of Mr. Cohen's  
15 arguments.

16 First of all, as to the need to reach out to the  
17 Justice Department, frankly, the question of ambiguity or not  
18 within a decree is a question for the Court. I think that our  
19 submissions, the argument today, the decree itself demonstrably  
20 reflects that there's no ambiguity here. It may be there that  
21 are policy issues that ASCAP is troubled about. That footnote  
22 in the Department of Justice memorandum reflects things may  
23 change -- may need to change the decree, but right now it's  
24 unambiguous, and our motion should be granted as a consequence.

25 We'll come back to what, if anything, we'll request of

D98TPANA

1 Justice, but to be absolutely clear, we don't think it's  
2 necessarily. Clearly Justice has been advised. Justice knows  
3 this is going on. They obviously felt -- and I think Mr. Cohen  
4 suggested that their initial responses was let's see what the  
5 judge does, so our view is let's see what the judge does.

6 Now secondarily, even if there is going to be an  
7 outreach to Justice, that would cause delay.

8 THE COURT: No.

9 MR. STEINTHAL: Well, it would cause a delay between a  
10 decision immediately and a decision in December, and I want to  
11 talk about why that's so important. And I want to float the  
12 following, which goes back to why at the very beginning I said  
13 I know that our arguments have implications beyond our specific  
14 motion, but again, all of what Mr. Cohen is complaining about  
15 and wanting to go to Justice about relates to interpretations  
16 that don't affect our argument that whatever the broader  
17 implications, there's no way, if we have on the date of  
18 application all these works in the repertoire, you can't  
19 eviscerate Section 9.

20 This other stuff about partial withdrawals, that goes  
21 to Sections 4 and 6, it really -- there's a separate issue  
22 here, and it's an equitable issue and a Section 9 issue. For  
23 this case you can say look, the repertoire was the repertoire  
24 at the point in time when we applied, no publisher withdrawals  
25 will have affect on the scope of the repertoire that is going

D98TPANA

1 to go to trial in December. That gives Justice opportunity to  
2 talk about the broader issue. Maybe we can frame the broader  
3 issue in a much more relaxed fashion, for lack of a better  
4 word. But your Honor, you have the capacity in the context of  
5 this specific motion to say look, Article 9 would be  
6 eviscerated if I permitted the repertoire to be diminished  
7 after a licensee legitimately invoked its rights under Article  
8 9. If we get that ruling from you, your Honor, then we can go  
9 to trial. And I will explain why it's important we get it  
10 beyond this, but we can go to trial and the broader issue  
11 doesn't have to slow anything down.

12 Why is it so important? Mr. Cohen says it's easy, set  
13 a rate and whatever the number of performances it is, it is,  
14 and it will be a percentage of that. It's not so simple.  
15 Because as I read from the DOJ memo earlier, if we have so  
16 little left in that blanket license, then all the aspects of  
17 indemnification and access, those values go away, number one.

18 Number two, there's got to be a showing -- there's an  
19 evidentiary issue here, your Honor. Do I not have to get ready  
20 for trial thinking that I've got to demonstrate that what is  
21 left in the ASCAP repertoire is not representative, and  
22 therefore, it's a lesser value? Hypothetically, suppose -- I'm  
23 sure there are a lot of publishers and say my stuff is better  
24 than their stuff, and we should get a higher price, if it was  
25 just me licensing in the market compared to someone else

D98TPANA

1 licensing in the market. I think some economist might very  
2 well say if the best of the repertoire has been pulled out and  
3 they're now getting X plus percent, and the prior rate was X,  
4 well maybe what's left should get X minus. You have to  
5 evaluate what's left. You can't just assume that every work  
6 has the same proportionate value. Mr. Cohen is asking you to  
7 determine now that every work has the same proportionate value.  
8 I just don't think that's fair to say. I need to know in  
9 advance of trial whether I have got to deal with that.

10 Because if you ultimately allow these withdrawals so  
11 that the scope of the license Pandora gets from ASCAP, the  
12 limited -- this is just Pandora now, just what my mom told me,  
13 I only care about Pandora. In this particular case, if you  
14 tell me the license that I've got to go to trial and prove the  
15 value of is just what's left after all the scheduled  
16 withdrawals, I've got to now talk to experts about a different  
17 way of valuing what's there then if we're talking about the  
18 full ASCAP repertoire. So we have a very important reason for  
19 you to rule on this as to the limited circumstances of  
20 Pandora's consent decree license. We need that ruling now so  
21 we can get ready for trial.

22 There's another part of this is that is equitable.  
23 Think about it from this perspective: If we don't get a ruling  
24 from you, the Sony and EMI licenses are expiring 12/31/12. The  
25 Warner/Chappell withdrawal is effective 1/1/13. The Cobalt

D98TPANA

1 withdrawal is effective October 1, 2013. I think I said  
2 1/1/13, I meant 1/1/14.

3 The bottom line is, your Honor, if we don't get a  
4 ruling from you, we have got to negotiate direct licenses that  
5 we don't think we need to have. Because we think the proper  
6 construction, at least of Pandora's circumstances, is that  
7 we're entitled to a blanket license with all of the repertoire  
8 before any withdrawals occurred after our consent decree  
9 license took effect. So we've got not only proof problems if  
10 you don't rule, we've got enormous practical and licensing  
11 problems if you don't rule.

12 So I urge the Court that if there's any degree to  
13 which you feel you need to wait for some feedback from Justice,  
14 that goes to the broader issue. It doesn't go to the more  
15 limited issue of whether, at a minimum, your interpretation of  
16 the decree, and not just the definitions of work and repertoire  
17 and mandatory licensing under Section 6, but a minimum the  
18 Section 9 protections to licensees cannot be subverted.

19 That's why we need a ruling now, combination of we  
20 need to get ready for trial, we need to know whether we have to  
21 prove that what's left in the repertoire is not representative,  
22 and therefore, we want -- we need to prove that the value of  
23 what's left is not proportionately equal to that which has been  
24 pulled out. We need to know that.

25 THE COURT: So in this narrower ruling, the burden

D98TPANA

1 would then be imposed upon ASCAP to -- if it thought it could  
2 permit partial withdrawals, to make them subject to a licenses  
3 in effect provision so it did not impact entities like Pandora,  
4 that it also already applied for a license to begin before  
5 withdrawal date.

6 MR. STEINTHAL: That would be correct, your Honor. As  
7 we articulated, it would be if our application -- if our  
8 consent decree license was treated as a license in effect, we  
9 wouldn't have this problem. And that's the way we couched it.  
10 And it struck us that the record reflected that ASCAP was  
11 considering, for example, the RMLC agreement as effectively a  
12 license in effect, as you couldn't otherwise harmonize some of  
13 the language in the letters that we cite in our papers.

14 But the bottom line is if you look at even ASCAP's own  
15 rules, it doesn't define license in effect other than that it's  
16 an entity that has a license. So it doesn't talk about  
17 finalizes, interim licenses, consent decree licenses, it talks  
18 about having a license in effect.

19 As far as I'm concerned, and we put this in our  
20 papers, our ability to perform ASCAP music as a licensee was no  
21 different on January 1st, 2011, than it would be if we were a  
22 final signed blanket licensee. We couldn't be sued for  
23 infringement. We had access to the entirety of the ASCAP  
24 repertoire on that date. Why is that not a license in effect?

25 I understand their position is well, we -- my view --

D98TPANA

1 arbitrarily decide it's not. But if you found that we can be  
2 treated as effectively having a license in effect, or you  
3 found -- and I think you could find this, I think it's true --  
4 that to do otherwise violate Article 9, because we would be  
5 deprived of our Article 9 right for rate setting as to the  
6 entirety of the repertoire.

7           The Article 9 provision is clearly being subverted by  
8 ASCAP's provision. And from that perspective, I don't see how  
9 they could even make a whimsical argument, because we have the  
10 right to use all those works. How can it be that -- and think  
11 about it this way, what if, your Honor, we go to trial and  
12 50 percent of the repertoire is in there, and we get a great  
13 recalling for Pandora. What stops them from saying I'm out of  
14 here the next day? I mean it can't be that they can play this  
15 day by day and decide I'll wait and see how ASCAP is doing in  
16 the rate court proceedings or not. There has to be some  
17 definitiveness. We applied for a license. We were licensed  
18 effective 1/1/11 and have a consent decree license for a  
19 five-year term. How can they pull the rug out from under us  
20 consistent with Article 9?

21           THE COURT: But on the other hand, EMI, after the rate  
22 court proceeding, if it doesn't like the ruling, could simply  
23 withdrawal entirely from ASCAP, take all its works for all  
24 purposes, and they would not be covered by the ASCAP license.

25           MR. STEINTHAL: And you know what, at least we



D98TPANA

1 wouldn't be discriminated against relative to other licensees.  
2 We would be on the same footing as everybody else.

3 If they want -- I don't think they want to do that,  
4 your Honor. I don't think they want to do it. They can do it.  
5 I'm not saying they can't. But there's nothing in the decree  
6 right now that permits this notion that our work is in for some  
7 licensees and out for others. And that's the rub.

8 Now how do we do this in a way that has some degree of  
9 equity and some protection to the rights of a licensee like  
10 Pandora in these circumstances without delaying the trial and  
11 without waiting for justice? It's to do the more limited  
12 holding now and keep options open, so to speak, if the Justice  
13 Department wants to weigh in and your Honor wants to wait for  
14 that.

15 Again, I can't say enough that we don't think you need  
16 to wait. It's a question of ambiguity and unambiguity, and we  
17 think it's unambiguous, and that your Honor has the ability to  
18 make this ruling now without waiting. Justice has been made  
19 aware, and they obviously didn't think it was important enough  
20 to come up here or they had enough to say immediately.

21 THE COURT: I'm not willing to infer anything from the  
22 silence. They have a lot on their plate, and, if anything, I  
23 say I would like a fuller record.

24 MR. STEINTHAL: So I have addressed, I think, the  
25 issue of whether to wait or not and why we can't in order to

D98TPANA

1 avoid the situation that I described. I'm going to very  
2 briefly address some of the, frankly, mostly new arguments made  
3 by Mr. Cohen in his presentation.

4 He said there's nothing in the decree that speaks to  
5 ASCAP's ability to the license works to some licensees and not  
6 other licensees. I found that to be surprising, because if you  
7 look at Section 6, in fact, there is a provision that relates  
8 to ASCAP's ability to license works to some licensees and not  
9 to other licensees.

10 And I urge your Honor to take a look. It's the latter  
11 portion of Section 6 after the mandatory licensing provisions.  
12 It says ASCAP shall not grant to any music user a license to  
13 perform one or month specified works in the ASCAP repertoire  
14 unless both the music user and member or members in interest  
15 shall have requested ASCAP in writing to do so.

16 So there is a provision that would allow a more  
17 limited license, so to speak, where some users are licensed and  
18 some are not, but it requires the user's consent. It's not as  
19 if the decree is silent on it, there's a provision in the  
20 decree that addresses it.

21 Obviously we didn't -- it's not something that I would  
22 have cited affirmatively to you in great measure other than the  
23 fact that it contradict Mr. Cohen's point that the decree is  
24 absolutely silent about the possibility of ASCAP licensing  
25 works to some users and not other users. It's possible, but

D98TPANA

1 that's not what is happening here. We don't have that consent  
2 of Pandora here.

3 THE COURT: Well, it wouldn't be your consent, it  
4 would be, for instance, RLMC, right?

5 MR. STEINTHAL: But RLMC did not agree, your Honor, to  
6 a license to less than all of the ASCAP repertoire. They did  
7 not agree to a license to perform one or more specified works  
8 within the repertoire. They got the whole repertoire.

9 THE COURT: Right.

10 MR. STEINTHAL: To the extent ASCAP wants to have the  
11 ability to license specified works in the repertoire, it would  
12 require the user's consent. The decree enjoins ASCAP from  
13 licensing less than all the repertoire absent Pandora's  
14 consent.

15 Now the reference to Alden-Rochelle and the relief  
16 there, your Honor, that was an injunction flowing from an  
17 antitrust case against ASCAP. There's no way this injunction  
18 is instructive about purported partial withdrawals of subsets  
19 of rights or subsets of works. Those partial withdrawals that  
20 are at issue here apply to ASCAP's right to license some users  
21 and not other users. That's not what was involved in  
22 Alden-Rochelle. And here, where ASCAP as not been enjoined  
23 from licensing an entire sector based on a prior antitrust  
24 suit, there's nothing in the decree that permits ASCAP to the  
25 license works on that the basis, and Alden-Rochelle doesn't

D98TPANA

1 help them in any way, shape or form.

2 Mr. Cohen refers to Article 4. I would alert the  
3 Court to footnote 20 in our brief as to Article 4F, which we  
4 think to the extent Article 4 is instructive here at all, it  
5 favors us and our interpretation, not ASCAP's. That's the  
6 provision which provides that ASCAP may not assert or exercise  
7 any right or power to restrict from public performance by any  
8 licensee of ASCAP any work in order to exact additional  
9 consideration for the performance thereof.

10 And we would argue that's exactly what's happening  
11 here where specific subsets of the ASCAP repertoire are being  
12 removed as to Pandora and not to other users for the exact  
13 purpose of exacting additional consideration. So, if anything,  
14 Article 4 supports us.

15 The '41 decree, your Honor, it can't be used to try to  
16 create ambiguity that does not currently exist. I'm not going  
17 to say anything more about that.

18 THE COURT: Well, I guess I would like you to say  
19 something more about it. I agree with that general point of  
20 finding ambiguity, but it's talking about prohibiting -- ASCAP  
21 cannot prohibit members from issuing exclusive licenses.

22 So to me, it's not talking about what ASCAP can do or  
23 not do with respect to a work within the ASCAP repertoire, it's  
24 talking about ASCAP making as a condition of membership or  
25 ASCAP conditioning membership on ASCAP's control of how the

D98TPANA

1 members behave even with respect to perhaps works that aren't  
2 part of the repertoire. Am I reading this wrong?

3 MR. STEINTHAL: I would agree with your Honor, and I  
4 think it has nothing to do with the issue of the current decree  
5 and ASCAP's obligations to license all the works in the  
6 repertoire as defined in the manners we talked about earlier.  
7 So I don't think it creates an ambiguity, but I also don't  
8 think that -- I don't think you can use it to create an  
9 ambiguity, so it's irrelevant, but even if you went there, I  
10 don't think it helps their position on this issue.

11 And just a couple more little points. There are so  
12 many that were brought up. But this whole notion of the policy  
13 of the decree to promote direct licensing, your Honor is well  
14 aware of the fact that direct licensing has existed under the  
15 decree previously. There's no need for these partial  
16 withdrawals in order to protect the rights of publishers to  
17 direct licenses. So I think that's the easy answer to that  
18 one, and I could develop it more if I had more time.

19 And as far as BMI is concerned, I go back to what my  
20 mother said to me, you have only one thing to worry, and that's  
21 the ASCAP consent decree. What happens with BMI happens with  
22 BMI. I think it's entirely speculative to think about how  
23 publisher withdrawals are going to impact BMI. BMI filed a  
24 rate court proceeding against Pandora a few months ago and it  
25 will play out how it plays out. But that can't be an issue for

D98TPANA

1 your Honor as you try to sort through what the ASCAP decree  
2 means and the relief we seek on this motion.

3 So those are my point generally and specifically on  
4 the two big issues at the very beginning, and I don't know how  
5 you would like to deal with the questions that might be sent  
6 the way to the Department of Justice. We have a different  
7 approach to that than ASCAP does, for sure.

8 THE COURT: What is your approach?

9 MR. STEINTHAL: Our question would be: If the Court  
10 finds any ambiguity in Articles 6 and 9 of AFJ2, to what would  
11 the Department of Justice point the Court to consider in  
12 resolving such ambiguity?

13 THE COURT: OK. Thank you.

14 MR. COHEN: Your Honor, may I be heard briefly? I'm  
15 mindful you didn't invite us for dinner, so I will be very,  
16 very quick.

17 One of the problems with kind of reading a decree on  
18 the fly is that it gets read on the fly. So Mr. Steinthal's  
19 reading of Article 6 is completely wrong. The first part of  
20 Article 6, Section 6, talks about what ASCAP is ordered to do  
21 for a music user who seeks the right to perform all of the  
22 works in the ASCAP license, in the ASCAP repertoire. That's  
23 what his client asked. The remainder is what happens when  
24 somebody asked for one or more specified works. So when  
25 somebody makes a request for blanket license like Pandora, the

D98TPANA

1 second part of Section 6, Article 6, has no applicability at  
2 all, and we can't start reading the decree out of the  
3 historical context.

4 With respect to the timing question, I must say, your  
5 Honor, I was surprised by Mr. Steinthal's argument. I will  
6 have a completely different case to try if we were to lose  
7 summary judgment, and I don't understand how he could have said  
8 his case -- his trial preparation depends upon winning summary  
9 judgment. I mean the fact of the matter is the case was filed  
10 on November 3rd. If they thought they could not get to trial  
11 in a cohesive way without sorting this issue out, since he says  
12 it's an unambiguous question of decree interpretation, he  
13 should have filed his motion months and months and months ago.  
14 And we'll both have to go to trial and prepare for trial -- and  
15 I know he's perfectly capable of preparing for trial --  
16 understanding that we won't know the answer to his question.  
17 And whether or not he has to value what is left in the ASCAP  
18 repertoire or not, if the motion were denied today, that's  
19 precisely what he would have to do.

20 So I don't understand the argument that he does not  
21 now have time to prepare for trial. No one could make their  
22 trial plan based on an assumption about what the Court would  
23 rule on summary judgment. So he's in exactly the position  
24 today that he put himself in when he decided to make a late  
25 summary judgment motion, and presumably he has been prepared --

D98TPANA

1 I know he's been preparing for trial, I have seen a lot of  
2 Mr. Steinthal at depositions. He has been preparing for trial,  
3 and he does not have the right to demand a rush to judgment so  
4 that he could prepare for trial on the assumption that he would  
5 win summary judgment. And your Honor will rule obviously the  
6 way your Honor will rule, but I don't think either party has  
7 the right to say I prepared for trial on the premise I would  
8 win on summary judgment, and now that I don't know, I'm not  
9 really going to be able to do it, and I think he can do it.

10 With respect to the narrow versus broad, I think the  
11 more that we explore this issue, the issues are clearly  
12 interrelated. I don't think the narrow issue -- we didn't  
13 spend a lot of time on this, but we do say clearly in our brief  
14 that if we are going to focus on the question of licenses in  
15 effect, our position, and think it's quite clear, is there is  
16 nothing in the decree, Article 11(b)(2), which is the only  
17 reference to licenses in effect in the decree, makes quite  
18 clear that it is only in the decree -- (b)(3) rather -- in the  
19 event that the BMI decree is amended.

20 So if we look at Section 11(c), it says each provision  
21 of Section 11(b), and that includes the licenses in effect  
22 provisions, shall only be effective upon entry of an order in  
23 the U.S., which hasn't happened. There's no dispute about  
24 that. So how can we, as a matter of decree interpretation,  
25 answer the narrow question, because we can't answer it, because



D98TPANA

1 there is no such thing as licenses in effect? And I assume  
2 that's why the Court posed the broader questions about what's  
3 in the ASCAP repertoire and what's not.

4 So I don't understand this distinction between the  
5 narrow question and the broad question. If the narrow question  
6 is did they get a license in effect when they applied for a  
7 license on January 1, the answer is there is no such thing as  
8 license in effect in the current decree. So I don't see how  
9 that helps Mr. Steinthal. I don't know how that question can  
10 be answered in his favor on summary judgment unless your Honor  
11 decides it the way that you were inclined to decide it when we  
12 came in here today, which is to say I'm looking at the  
13 definition of works and licensing works. So I think we're  
14 necessary asking the broader question.

15 Here's a question that we think is helpful for DOJ.  
16 It's close to your question four, but we took out the language  
17 of assignment. I will try to do it slowly because we don't  
18 have the transcript. Whether AFJ2 requires an ASCAP member to  
19 grant to ASCAP permission to license the public performance  
20 right in its works --

21 THE COURT: No. Certainly AFJ2 does not regulate  
22 members.

23 MR. COHEN: So that's why you framed it -- then I'm  
24 content to rest on question four. I'm content -- I understand  
25 now why you phrased it the way you did.

D98TPANA

1 THE COURT: AFJ2 is simply a regulation of ASCAP.

2 MR. COHEN: I understand your language. I'm perfectly  
3 content to take question four, and I don't think the kind of  
4 ambiguity question that was asked by Mr. Steinthal goes to the  
5 heart of what we're doing. I think question four is the heart  
6 of what we're doing, so that would be the question that I think  
7 we would ask.

8 Let me say one thing about DOJ. I will get myself in  
9 trouble by making representations. They'll speak for  
10 themselves. They did not say they were content to wait for the  
11 Court. I will as accurately as possible report what I said in  
12 my conversation, which they are busy, they have a lot of work,  
13 they didn't think they would be in a position in the time  
14 allotted between the time of the entry of your order last  
15 Thursday and today to respond, so they said they would not be  
16 responding. I asked them to respond. I asked them to come.  
17 But I don't think it's because they have a view or they're  
18 waiting. And I think your Honor can ask them and I think they  
19 will respond. And they told me if they are asked by the Court,  
20 they will do what they need to do. So I think you can get them  
21 to respond quickly. I'm hopeful they will respond quickly.  
22 And for all the reasons that we discussed earlier, I think it's  
23 important to get their views. And this is an important  
24 overarching decree issue for ASCAP that goes just far beyond  
25 Pandora, and we would like to have their views.

D98TPANA

1 MR. STEINTHAL: Your Honor --

2 THE COURT: So have you made written submissions to  
3 DOJ construing AFJ2 with respect to these issues?

4 MR. COHEN: No, your Honor, I made no written  
5 submissions to DOJ. We had conversations with them about the  
6 licenses in effect issue. Your Honor, I take that back. We  
7 may -- we were asked to provide to DOJ examples of how we  
8 treated licenses in effect historically. That's a submission  
9 that we made.

10 On the questions that you posed in last Thursday's  
11 order, I did not make a written submission. I had a  
12 conversation with four or five folks from DOJ, Mr. Reed's  
13 section, earlier this week, Monday afternoon, but nothing in  
14 writing about the questions that you've posed, nothing in  
15 writing with respect to question four. The only thing they  
16 asked us to provide to them, and I'm happy to provide it to  
17 court if it's useful, is how has ASCAP treated licenses in  
18 effect historically, the difference between final licenses and  
19 interim licenses. And we submitted materials to them to show  
20 that ASCAP has historically treated only final licenses as  
21 licenses in effect, paid members only on the basis of final  
22 licenses, and works that were in the repertoire at the time of  
23 withdrawal. With respect to interim licenses, ASCAP no longer  
24 paid the members and left the members to deal with the new  
25 association. I'm happy to provide that to your Honor, but it

D98TPANA

1 doesn't goes to these questions, it goes to the questions of is  
2 a license in effect historically the final licenses or interim  
3 licenses.

4 THE COURT: This triggers a completely different  
5 question in my mind. Please indulge me. I want to make sure  
6 that I understand what has happened here. EMI is a publisher.  
7 There are public performance rights that originate with artists  
8 and publishers. There can be contractual arrangements between  
9 artists and publishers with respect to works in the  
10 collection -- I am speaking slowly here because I want to make  
11 sure counsel correct me if I have a misunderstanding -- with  
12 respect to licensing fees.

13 I want to make sure that the works that -- and using  
14 EMI as an example, that EMI withdrew from the ASCAP repertoire  
15 for purposes of collecting licensing fees in new media, removed  
16 those works for all rights holders from the ASCAP repertoire.  
17 Let us say there was song A, does it remain in the ASCAP  
18 repertoire for new media use for use by music user in the new  
19 media space when it is a song published by EMI, so any fees  
20 collected for the publisher would not come to ASCAP, but ASCAP  
21 may collect fees and send them to the composer on the very same  
22 work.

23 MR. COHEN: I'm not sure I precisely understand the  
24 question. There are a couple of observations I would make, and  
25 maybe we could parse it out. One, for some number of these

D98TPANA

1 works, the composer no longer owns the copyright but has  
2 assigned the copyright to EMI. There are, as I understand it,  
3 I'm not the world's leading expert on publishing agreements,  
4 but there are publishing agreements between EMI writers, let's  
5 call them, and EMI which either assign or ask EMI to administer  
6 the copyrights on their behalf and to license and collect on  
7 their behalf. That is certainly true.

8 One part that I wasn't sure about was are you asking  
9 whether EMI has withdrawn all of its works from ASCAP for new  
10 media?

11 THE COURT: Well, I understood that was yes.

12 MR. COHEN: It did in stages. The initial withdrawals  
13 in May of 2011 were with respect to certain catalogs. So EMI  
14 is not one entity, it has multiple ASCAP catalogs and also BMI  
15 catalogs. It initially withdrew nine catalogs and subsequently  
16 withdrew the remainder of its catalogs for new media uses, with  
17 the exception of -- it gets complicated -- of so-called  
18 standard services.

19 So new media users that are expected to pay  
20 performance fees of \$5,000 or less a year -- not Pandora, not  
21 the major ones -- EMI has given back to ASCAP the right to  
22 license those standard services presumably because of the  
23 efficiency of the marketplace and a concern that some of those  
24 small services would go unlicensed, and ASCAP was in a better  
25 position to do it than EMI.

D98TPANA

1 With respect to the non-standard new media services,  
2 as I understand it, EMI now has the right to license. It has  
3 entered into a subsequent administration agreement with ASCAP  
4 in which because EMI is not ASCAP, EMI is entering into a deal  
5 with Pandora and coming back to ASCAP and saying when I get the  
6 money from Pandora, ASCAP, you will distribute that money on  
7 our behalf, not because they are ASCAP monies, but because you  
8 as a distribution entity are well situated to do it. And  
9 there's a contract. EMI shopped the contract. It could have  
10 gone to somebody else.

11 I'm sorry to make it so complicated, I'm trying to be  
12 as accurate as I can be.

13 THE COURT: No, this solves the big question in my  
14 mind of why EMI would set up a back office operation to  
15 duplicate what ASCAP does, and it decided not to, it just  
16 contracted with ASCAP to do it.

17 MR. COHEN: And possibly with BMI as well, but I don't  
18 know. I believe that the administration -- I will turn  
19 slightly to make sure I'm getting the right thing -- only with  
20 respect to ASCAP works. So yes, it pays a fee now to ASCAP to  
21 administer that, although those distributions have not yet  
22 occurred, just make it more complicated. But yes, your Honor,  
23 that's my understanding of what occurred.

24 THE COURT: So putting aside the non-standard music  
25 users -- or is it the standard music users?

D98TPANA

1 MR. COHEN: I think putting aside the standard.

2 THE COURT: Putting aside the standard music users,  
3 when EMI withdrew a catalog for new media purposes, does that  
4 mean -- and putting aside this administration agreement, does  
5 that mean that ASCAP does not distribute any licensee income to  
6 any composer or artist associated with the works in the EMI  
7 catalog?

8 MR. COHEN: With respect to those new media uses, to  
9 be hyper accurate, ASCAP does not collect any fees with respect  
10 to those performances. I'm being hyper accurate. Because of  
11 the administration agreement, it may actually wind up doing the  
12 distribution, but it's essentially doing what ADP would do if  
13 that were a competitor for ASCAP with respect to distribution.  
14 There are EMI moneys that EMI has said you have all this  
15 information, you can more efficiently distribute the royalties  
16 to our writers than we can, but it's our money, it's not  
17 ASCAP's money.

18 THE COURT: Let me approach it this way. Does EMI  
19 control all the public performance rights for all of the  
20 artists on the works in the catalogs that were withdrawn?

21 MR. COHEN: That's a question I can't answer because I  
22 would imagine there are contractual arrangements between  
23 writers and EMI that may vary from that. So I would be  
24 reluctant to posit an answer. That is the general state of  
25 affairs that the publisher has been asked by the writer to

D98TPANA

1 enter into the right of public performance, but what I don't  
2 know is whether there are agreements in which writers restrict  
3 EMI in some way from certain kinds of public performance as  
4 between the actual writers or composers on the one hand and the  
5 publisher on the other. And two, if they don't restrict it,  
6 what I don't know is whether the writer has the right to also  
7 license. So I can't answer that. That's just a question I  
8 can't answer. And I suspect there's a contractual variation,  
9 but I'm at the edge of my knowledge.

10 THE COURT: Thank you for being responsive. But you  
11 understand the implications are that the work remains in the  
12 ASCAP repertoire for certain purposes, even for new media  
13 usage, insofar as the artist who is an ASCAP member has a right  
14 to that licensee income and has not given over to EMI the right  
15 to collect that on his behalf or her behalf.

16 MR. COHEN: I apologize, your Honor, I'm not sure I  
17 understand your point.

18 THE COURT: That's OK. Thank you.

19 Mr. Steinthal.

20 MR. STEINTHAL: Two quick things, your Honor. First  
21 of all, lest there be any confusion, part of the question is  
22 whether EMI's withdrawn works are available for licensing  
23 through ASCAP for some licensees and not so for others. The  
24 answer is demonstrably yes. Most new media transmission  
25 licensees of either EMI or ASCAP get their new media



D98TPANA

1 transmission rights from ASCAP. The broadcasters who were  
2 covered by the RLMC agreement include all of our biggest  
3 competitors in internet radio, and they get their new media  
4 transmission rights, including specifically as to the, quote,  
5 EMI withdrawn works, from ASCAP, not from EMI; so the standard  
6 services and many others, including others that are deemed to  
7 have licenses in effect. So I wanted that to be crystal clear.

8 The other thing I wanted to be crystal clear is this  
9 licenses in effect notion. Our argument is not in any way,  
10 shape or form that AFJ2 includes any kind of license in effect  
11 requirement. We're not arguing that AFJ2 requires that we be  
12 treated as having a license in effect. We appreciate there's  
13 no license in effect requirement at AFJ2.

14 Our position as to why you need to grant our motion  
15 from a smaller issue rather than the bigger issue is that to do  
16 otherwise would violate Article 9. It would viscerate the  
17 Article 9 protection which we unequivocally were entitled to on  
18 the day we applied for a license.

19 So just to be crystal clear, it's not rooted in the  
20 notion that there is a license in effect requirement decree,  
21 our position is rooted in the fact that if you don't rule in  
22 our favor on this motion and determine that the scope of the  
23 license that Pandora is entitled to, we will have been deprived  
24 of our Article 9 right. And that's somewhat smaller than the  
25 broader issue. I understand that part of the way to get there

D98TPANA

1 may create issues broader than Pandora, but to be very, very  
2 clear, the Article 9 issue is unique to someone in Pandora's  
3 circumstance, and the hook for you to grant our motion is  
4 Article 9, not some license in effect provision of the decree,  
5 which we all acknowledge there is no license in effect  
6 requirement in the decree. I want that to be clear.

7 THE COURT: Before we part, let's just -- I want to  
8 reflect on whether or not I want to ask for DOJ to weigh in  
9 here. But if I do, I will decide that quickly. And right now  
10 the question to be posed is question number four on my list,  
11 and the issue is what kind of briefing would be of help to DOJ  
12 in addressing that. And I would think that we would put page  
13 limits. There are two ways to go, either simultaneous briefs  
14 or a set of three briefs, a principal brief, an opposition  
15 brief, and a reply.

16 Mr. Steinthal, do you have a view to which format, and  
17 if it is three briefs, who goes first?

18 MR. STEINTHAL: Well, most importantly is expedition,  
19 so I think if we exchange briefs as to what the Justice  
20 Department ought to be weighing in on in a prompt schedule, I  
21 think that would be the way to go.

22 THE COURT: Mr. Cohen, do you have a view?

23 MR. COHEN: Simultaneous brief. But I'm not sure  
24 Mr. Steinthal reflected the question, not whether the Justice  
25 Department should be weighing in on, but our view of question

D98TPANA

1 four to assist the Justice Department. Is that what you want  
2 us to brief?

3 THE COURT: No, the submissions to DOJ on question  
4 four should be simultaneous --

5 MR. COHEN: To DOJ?

6 THE COURT: -- to DOJ.

7 MR. COHEN: Yes, I agree with that, your Honor.

8 THE COURT: And page limits 20 pages apiece?

9 MR. COHEN: That's fine with us, your Honor.

10 MR. STEINTHAL: That's fine.

11 THE COURT: Give me one second.

12 (Pause)

13 THE COURT: Well, I want to thank counsel very much  
14 for this afternoon's presentation.

15 A couple of observations. One, Mr. Cohen, the text is  
16 not your friend here, so I was a little surprised that you  
17 didn't want to go to the purpose and context and antitrust  
18 impact here. I am very concerned about unintended  
19 consequences. Whatever ruling I give, I want to be as narrow  
20 as possible. I am comforted to some extent that I have able  
21 counsel on both sides here and the ability of certainly ASCAP  
22 to engage DOJ, and if it needs a revision to the consent decree  
23 to ask for that. Because I'm very conscious of the fact this  
24 is not the first time in the history since 1941 that there's  
25 been a technological revolution, and challenges, practical

D98TPANA

1 challenges, a change in the environment. And I want to be very  
2 sensitive to that. But ultimately I think my job on this  
3 question is a very narrow one, it's a textual interpretation  
4 issue. So I want to thank you. I'll reflect. If we are going  
5 to send a question to DOJ, I will reflect on the question it  
6 will be. If it's different than this question, I will give you  
7 a chance to be heard because I want it to be precise and  
8 appropriate. Thanks so much.

9 o0o